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When Equal Protection Fails: How the Equal Protection Justification for Abortion Undercuts the Struggle for Equality in the Workplace

Cover Page Footnote

J.D. Candidate, 2003, Fordham University School of Law. I am grateful to Professor James E. Fleming for his thoughtful comments and guidance with this Note. I would like to thank my parents for their constant love, faith, and support. Thanks also to Alex, my best friend and future husband, for being the one who fulfills my life and always makes me smile.

WHEN EQUAL PROTECTION FAILS: HOW THE EQUAL PROTECTION JUSTIFICATION FOR ABORTION UNDERCUTS THE STRUGGLE FOR EQUALITY IN THE WORKPLACE

Kristina M. Mentone*

INTRODUCTION

Since women have had a constitutional right to an abortion, they have been able to participate more fully and equally in the economic and social areas of society.¹ Women have been able to delay or refrain from motherhood, and without the burdens of motherhood, they have been able to pursue laudable academic and professional goals.² There is, however, something very unequal with this premise: men who are fathers have long been able to accomplish similar pursuits.³ Fatherhood does not cripple men from achieving academic and professional success, but motherhood does act as a disability that thwarts a woman's academic and professional aspirations.⁴ If we accept that the only way a woman can develop a successful career is to abandon her desire to have children, then we accept that mothers can never be equal to others.

At the inception of our Constitution, women were considered subordinate members of society.⁵ During the twentieth century, women made great strides in their quest for equality, though they are still far from equal.⁶ Most feminists agree that we have not yet

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1. See *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992); *infra* text accompanying notes 57-59; *infra* notes 91-93 and accompanying text.

2. See *infra* note 320 and accompanying text (suggesting that women often feel compelled to delay motherhood in order to achieve professional success).

3. See *infra* text accompanying note 338.

4. See *infra* text accompanying notes 337-38.

5. See *infra* notes 30-36 and accompanying text.

6. See Susan Estrich, *Sex and Power* 70 (2000); Lundy R. Langston, *Women in the New Millennium: The Promises of the Past Are Now the Problems for the Millennium*, 6 *Cardozo Women's L.J.* 1, 1 (1999); Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist*

achieved true gender equality, but they are split as to the best way to ensure women's equality.⁷

Feminists disagree on specific issues, such as censoring pornography, as well as on the more general issues of feminism, such as the roots of gender discrimination, the current perception of women's equality, and ultimately, what the true meaning of "equality" is.⁸ Furthermore, feminists disagree about whether an equal society is one where the law is gender-blind, or one where the law takes gender into account, so long as it is to advance women's opportunities.⁹ This debate has been characterized as the sameness/difference debate, or the equal treatment/special treatment debate.¹⁰ Despite efforts to resolve the sameness/difference debate or to move beyond it, the debate has taken up a wealth of time and literature in feminist legal theory and has slowed the progression towards true gender equality.¹¹

An area of law where this debate is visible concerns maternity leave and other workplace policies. At the heart of these policies is the conflict between work and family. Some feminists argue that special laws, which cater to the needs of mothers, are necessary for women to be able to compete in the workplace.¹² Other feminists contend that special treatment puts women who take advantage of such laws on a "mommy track," essentially putting a ceiling on the accomplishments that women, and especially mothers, can achieve.¹³ Additionally, equal treatment feminists argue that such laws hurt women who do not take advantage of special treatment provisions because employers view all women as potential mothers who will utilize such options, or leave the workplace to care for their children.¹⁴

and *Critical Race Theory*, 1991 Duke L.J. 296, 300-01 (1991) [hereinafter Williams, *Dissolving the Sameness/Difference Debate*]; see also *infra* note 95 and accompanying text.

7. Ronald Dworkin, *Life's Dominion* 50-51 (1994); see *infra* text accompanying notes 95-96.

8. Dworkin, *supra* note 7, at 50-51; see *infra* text accompanying notes 100-01.

9. See Dworkin, *supra* note 7, at 50-51; Williams, *Dissolving the Sameness/Difference Debate*, *supra* note 6, at 310; *infra* notes 101-08 and accompanying text.

10. See Williams, *Dissolving the Sameness/Difference Debate*, *supra* note 6, at 310 ("Difference advocates opt for 'special treatment'; sameness advocates opt for identical treatment."). This Note therefore uses the phrase "special treatment" interchangeably with the term "difference," and "equal treatment" interchangeably with "sameness."

11. Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. Rev. 707, 709 (2000) [hereinafter, Selmi, *Family Leave*].

12. See Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* 217-18, 220-26 (2000) [hereinafter Williams, *Unbending Gender*].

13. See Cynthia Fuchs Epstein et. al, *The Part-Time Paradox: Time-Norms, Professional Lives, Family, and Gender* 29 (1999); Estrich, *supra* note 6, at 105; Deborah L. Rhode, *Justice and Gender* 122 (1989) [hereinafter Rhode, *Justice and Gender*].

14. See Elizabeth A. Reilly, *The Rhetoric of Disrespect: Uncovering the Faulty*

Whatever role special treatment laws take, they further at least one stereotype—mothers cannot compete as effectively as others in the workplace. Mothers are considered to be at a significant disadvantage in society because of their overriding obligations to children.¹⁵ Although there has been a recent trend in making parental leave available for fathers as well as mothers, fathers rarely take advantage of such opportunities and when they do, fathers take much shorter leaves and are looked down upon by their co-workers.¹⁶ For women to gain true equality, this separate conception of mothers must be eradicated.

Abortion is another area where conflicting views of feminism have become apparent. The issue of a constitutional right to an abortion permeates many aspects of general constitutional theory as well as feminist legal theory. Although most feminists would agree that the Constitution grants women the right to procure an abortion,¹⁷ they base the right on different lines of reasoning. Two of the arguments for a constitutional right to an abortion are based on the Fourteenth Amendment: one on the Due Process Clause¹⁸ and one on the Equal Protection Clause.¹⁹ The different theories supporting abortion affect women not only because abortion is primarily a women's issue, but also because abortion arguments depict a greater picture of how society and the courts view women as a whole.

This Note argues two general points. First, the debate over abortion arguments is linked to the work/family conflict. The equal protection argument for abortion fails to truly equalize women by intimating that, for women to be fully equal members of society and to participate more fully in the professions, they must be able to choose not to bear children.²⁰ This reasoning may help to equalize women who choose not to be mothers, but it perpetuates the view that mothers cannot be truly equal because motherhood interferes with their professional success.²¹ Thus, the equal protection argument for abortion aggravates the work/family conflict for mothers.²² Second, to

Premises Infecting Reproductive Rights, 5 Am. U. J. Gender & L. 147, 157-59, 162 (1996); *infra* notes 130-33 and accompanying text; *infra* text accompanying note 337.

15. See, e.g., *infra* text accompanying notes 335-37.

16. Epstein et al., *supra* note 13, at 29; Deborah L. Rhode, Speaking of Sex: The Denial of Gender Inequality 151-52 (1997) [hereinafter Rhode, Speaking of Sex]; Selmi, *Family Leave*, *supra* note 11, at 755-56.

17. Although many women do agree that there is a constitutional right to an abortion, there is a significant number of women who oppose such a right. See, e.g., Linda C. McClain, *Equality, Oppression, and Abortion: Women Who Oppose Abortion Rights in the Name of Feminism*, in *Feminist Nightmares* 159-88 (Susan Ostrov Weisser & Jennifer Fleischer eds., 1994).

18. See *infra* notes 66-71, 200-18 and accompanying text.

19. See *infra* notes 91-93, 240-74 and accompanying text.

20. See *infra* Part III.A.2.

21. See *infra* Part III.A.2.

22. See *infra* Part III.A.2.

resolve the work/family conflict and to achieve true gender equality, feminists must agree to disagree over the sameness/difference debate and develop methods that appeal to both sameness (or equal treatment) feminists and difference (or special treatment) feminists.²³ For true gender equality, mothers must be considered equal to fathers, and parents must be able to be ideal workers and ideal parents.²⁴ Only when the concept of family replaces the concept of mother in society, the law, and the workplace can gender equality truly exist.²⁵

Part I first explores the evolution of the role of women in society and the corresponding evolution of the treatment of women under the law. Part I then discusses the evolution of abortion rights and explores how abortion rights affected women's equality and progression into the workplace.

Part II first discusses the equal treatment/special treatment dichotomy. Part II then explains the debate between the equal protection argument for abortion and the privacy/autonomy argument for abortion.

Part III argues that the equal protection argument for abortion hinders true gender equality. Equality is left for childless women only, while women who choose to be mothers are thought to sacrifice educational and professional goals. Part III also argues that to resolve the work/family conflict, feminists need to find a middle ground where they can get past the equal treatment/special treatment debate.²⁶ Finally, Part III proposes specific methods that may help to integrate the concept of family into the workplace while promoting true gender equality.

I. HISTORICAL OVERVIEW OF WOMEN AND THE LAW

When John Adams assisted the Framers in drafting the Constitution, his wife Abigail told him to "remember the ladies and be more generous and favorable to them than your ancestors."²⁷ Adams responded, "I cannot but laugh."²⁸ Obviously, he and the other drafters of the Constitution did laugh at the thought, as women were not once mentioned in the Constitution.²⁹

23. See *infra* Part III.B.1.

24. See *infra* Part III.B.2; see also Williams, *Unbending Gender*, *supra* note 12, at 1-6 (discussing how the norm of the ideal worker, i.e. an employee who works "full time and overtime and takes little or no time off for childbearing or child rearing," is structured around male norms).

25. See *infra* Part III.B.2; see also Williams, *Unbending Gender*, *supra* note 12, at 65 (suggesting that the market needs to be restructured around family values).

26. Cf. Williams, *Unbending Gender*, *supra* note 12, at 231-32 (proposing a new methodology that avoids the divisiveness of sameness and difference theories).

27. Eve Cary & Kathleen Willert Peratis, *Woman and the Law* 1 (1977).

28. *Id.* at 2.

29. See *id.*

Women's status under the law went unchanged for nearly a century. Women were denied access to "virtually every important area of human endeavor"³⁰ and men thought there was little need for women to be educated.³¹

Men were provided access to quality higher education as early as 1636, but women were not even allowed the most basic education until 1771.³² It was not until the late nineteenth century that women truly began advancing into higher education.³³ Even so, providing equal education for women was not looked upon favorably.³⁴ Discrimination resulting from notions that women were not suited for higher education remained quite strong even throughout the 1960s and 1970s,³⁵ and the greater the level of education, the greater the discrimination.³⁶

A. The Origin of Special Protection Laws

As women were obtaining higher education, the battle for gender equality followed them into the workplace. In 1873, in *Bradwell v.*

30. *Id.* at 3.

31. *See id.* Men believed women only needed limited education so that they could fulfill their roles as mothers and wives by "turning out well-informed, active male citizens." Wendy Kaminer, *A Fearful Freedom: Women's Flight From Equality* 113 (1990). Jean-Jacques Rousseau stated that

[t]he whole education of women ought to be relative to men. To please them, to be useful to them, to make themselves loved and honored by them, to educate them when young, to care for them when grown, to counsel them, to console them, and to make life sweet and agreeable to them—these are the duties of women at all times, and what should be taught them from their infancy.

Cary & Peratis, *supra* note 27, at 3 (quoting Jean-Jacques Rousseau, *L'Emile or A Treatise on Education* 263 (W.H. Payne ed., 1906)).

32. Cary & Peratis, *supra* note 27, at 3. Massachusetts ordered the General Court to establish Harvard College in 1636 and began to implement several provisions to ensure proper schooling for men, but these provisions did not include women. *See id.* In 1771, Connecticut began to allow girls to learn basic skills, but it took until the end of the eighteenth century for the majority of New England towns to make provisions for even the minimal education of girls. *See id.* at 3-4. In 1849, Elizabeth Blackwell became the first woman to obtain a medical degree in the United States. *Id.* at 5. She had applied to twenty-nine medical schools before being accepted into one. *Id.* Even after she was admitted, Blackwell faced continuing battles because of her gender. *See id.* For example, she had to obtain permission to witness dissections of human reproductive organs. *Id.*

33. *See Kaminer, supra* note 31, at 113.

34. *See id.* "[S]trenuous intellectual activity" was perceived as having a negative impact on a woman's reproductive functions, and women's pursuit of higher education was blamed for a decline in the birth rate at the turn of the century. *Id.* at 113-14. Moreover, women with higher education tended to remain single, or at least remain single longer than women with less education. *Id.* at 114.

35. *See id.* at 14 (describing college admissions policies that disfavored women and made it more difficult for female applicants to be accepted).

36. *See id.* (explaining that the lack of women in graduate and professional schools was not a result of lack of applications, and that several medical schools admitted to accepting men in preference to women).

Illinois, the Supreme Court upheld an Illinois state law that prohibited female lawyers from practicing in state courts.³⁷ Even as women did enter into the professional fields, the stereotypes asserted by Justice Bradley in *Bradwell* remained and provided the basis for protectionist laws that continued throughout the twentieth century.³⁸ The introduction of protectionist laws in the early 1900s initiated a division among feminists that continues today.³⁹ The Supreme Court, in its controversial decision in *Lochner v. New York*,⁴⁰ held that a state could not put a cap on the number of hours an employee could work.⁴¹ Only three years after *Lochner*, however, the Court decided in *Muller v. Oregon* that a state *could* put a ceiling on the number of hours a female employee could work.⁴² The Court explained that a law accomplishing the same purpose as the statute struck down in *Lochner* was permissible when applied to women.⁴³ The Court believed that women needed special protection because they were fragile and were especially disadvantaged by the burdens of motherhood.⁴⁴

Protective laws for women continued throughout the twentieth century, but in a new guise. The new wave of laws was meant to assist women in their quest for equality. For example, in 1987, the Supreme Court held in *California Federal Savings & Loan Assn. v. Guerra* ("CalFed") that special treatment for pregnant employees was permissible and was not in conflict with Title VII of the Civil Rights Act of 1964.⁴⁵ Title VII prohibited various forms of employment

37. *Bradwell v. Illinois*, 83 U.S. 130 (1872). "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." *Id.* at 141 (Bradley, J., concurring in the judgment). "[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender." *Id.* "The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood." *Id.* "The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator." *Id.*

38. See Kaminer, *supra* note 31, at 35-36.

39. *Id.* at 61; Cary & Peratis, *supra* note 27, at 21.

40. 198 U.S. 45 (1905).

41. *Id.* at 62, 64.

42. *Muller v. Oregon*, 208 U.S. 412 (1908).

43. *Id.* at 422-23. Although *Lochner* has long since been discredited, the Court did not base its decision in *Muller* on the grounds that *Lochner* was wrongly decided. *Id.*; see Kaminer, *supra* note 31, at 67-68.

44. *Muller*, 208 U.S. at 421. "[A] woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence. . . . This is especially true when the burdens of motherhood are upon her." *Id.* "[S]he is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained." *Id.* at 422.

45. *California Fed. Sav. & Loan Assn. v. Guerra*, 479 U.S. 272 (1987); see 42 U.S.C. § 2000(e) (1994).

discrimination, including discrimination on the basis of sex.⁴⁶ In 1976, the Supreme Court ruled that discrimination based on pregnancy was not considered sex discrimination under Title VII.⁴⁷ In response to that decision, Congress amended Title VII by passing the Pregnancy Discrimination Act ("PDA") in 1978 specifically to ensure that discrimination based on pregnancy was considered sex discrimination.⁴⁸ California had, at the same time, "a state statute that required employers to provide leave and reinstatement to employees disabled by pregnancy."⁴⁹

California Federal Savings and Loan Association ("California Savings") had a "facially neutral leave policy that permit[ed] employees who [had] completed three months of service to take unpaid leaves of absence for a variety of reasons."⁵⁰ These reasons included both disability and pregnancy.⁵¹ California Savings attempted to provide employees taking unpaid leave with a similar position upon their return, but if a similar position was not available, California Savings reserved the right to terminate the employee.⁵²

When a female employee was terminated after taking a pregnancy disability leave because her position had been filled and a similar position was no longer available, she filed a complaint with the Department of Fair Employment and Housing, which issued an administrative accusation against California Savings on her behalf.⁵³ The District Court held that "California state law and the policies of interpretation and enforcement... which require preferential treatment of female employees disabled by pregnancy, childbirth, or related medical conditions are pre-empted by Title VII and are null, void, invalid and inoperative under the Supremacy Clause of the United States Constitution."⁵⁴ The Ninth Circuit, however, overruled that decision and the Supreme Court affirmed, agreeing with the "Court of Appeals' conclusion that Congress intended the PDA to be 'a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.'"⁵⁵

46. *CalFed*, 479 U.S. at 276-77.

47. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 145-46 (1976).

48. *CalFed*, 479 U.S. at 277.

49. *Id.* at 274-75.

50. *Id.* at 278.

51. *Id.*

52. *Id.* The Fair Employment and Housing Commission was the state agency authorized to interpret the Fair Employment and Housing Act. *Id.* at 276.

53. *Id.* at 278.

54. *Id.* at 279 (citation omitted).

55. *Id.* at 285 (quoting *Cal. Fed. Sav. & Loan Assn. v. Guerra*, 758 F.2d 390, 396 (9th Cir. 1985)).

B. How Abortion Rights Affected the Feminist Movement

Women's quest for equality and the feminist movement picked up its pace beginning in the 1960s.⁵⁶ Women's numbers in the nation's universities were notably increasing and their numbers in the most prominent professions were increasing exponentially.⁵⁷ For example, while women made up only three percent of new entrants to the bar in 1960, more recent figures indicate that women account for forty-five percent of new entrants.⁵⁸ Women's influx into higher education and the professions may, in part, be a result of the Supreme Court's declaration of a constitutional right to an abortion.⁵⁹

The Supreme Court first held that a woman has a constitutional right to an abortion in *Roe v. Wade*.⁶⁰ At issue in *Roe* were Texas statutes that made it a crime to procure an abortion or attempt to do so except for the purpose of saving the life of the mother.⁶¹ The Court struck down the statutes with Justice Blackmun authoring the 7-2 majority opinion, and with only Justice White and Justice (now Chief Justice) Rehnquist dissenting.⁶² Justice Blackmun's majority opinion has three essential components. First, *Roe* established that there is a constitutional right to an abortion.⁶³ Second, the Court recognized that states do have an interest in the potential life and the health of the mother.⁶⁴ Third, the Court implemented the trimester framework as the measure for determining when a state's interest is significant enough to permit legislation regulating abortion.⁶⁵

Any competent analysis of *Roe* must not only consider the Court's finding that there is a right to an abortion, but must question what portion of the Constitution the Court determined provided that right. Justice Blackmun's majority opinion based a woman's right to procure an abortion on the broader right to privacy guaranteed by the Due Process Clause of the Fourteenth Amendment.⁶⁶ He acknowledged that although the Constitution does not explicitly mention a right of privacy, the Court has recognized that a right of personal privacy exists under the Constitution.⁶⁷ The opinion states that decisions such as *Griswold v. Connecticut*,⁶⁸ *Eisenstadt v. Baird*,⁶⁹ and other cases

56. See, e.g., Kaminer, *supra* note 31, at 114.

57. See *id.*; Rhode, *Speaking of Sex*, *supra* note 16, at 141.

58. Rhode, *Speaking of Sex*, *supra* note 16, at 141.

59. See *infra* text accompanying note 92.

60. 410 U.S. 113 (1973).

61. *Id.* at 117-18.

62. *Id.* at 115.

63. *Id.* at 154.

64. *Id.*

65. *Id.* at 163.

66. See *id.* at 153-54.

67. *Id.* at 152.

68. 381 U.S. 479 (1965) (holding that married persons have a constitutional right to use contraception).

69. 405 U.S. 438 (1972) (holding that the right to use contraception extends to

finding a right to privacy "make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy."⁷⁰ And this right of privacy, which the Court believed was founded on the Fourteenth Amendment's concept of personal liberty in the Due Process Clause, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."⁷¹

Although the decision in *Roe* acknowledged that the Constitution protects a right of personal privacy that does include abortion, the Court also concluded that this right is not absolute and may be considered against important state interests in regulation.⁷² Justice Blackmun declared, however, that the right to an abortion is a fundamental right and any regulation limiting that right must therefore be justified by a state's compelling interest and must be narrowly tailored to meet that interest.⁷³

The opinion further explains that the state's interest becomes more compelling as the pregnancy progresses.⁷⁴ The Court reasoned that with respect to a state's interest in protecting potential life, the compelling point at which a state may properly enact legislation regulating abortion is viability.⁷⁵ Therefore, the holding in *Roe* established that a state could prohibit abortions after viability, except when an abortion would be "necessary to preserve the life or health of the mother."⁷⁶

In 1992, the Supreme Court again wrestled with the constitutional right to an abortion and the scope of that right in *Planned Parenthood v. Casey*.⁷⁷ At issue in *Casey* was a Pennsylvania statute that imposed several regulations on abortion.⁷⁸

non-married persons as well).

70. *Roe*, 410 U.S. at 152 (citation omitted).

71. *Id.* at 153.

72. *Id.* at 153-55. Justice Blackmun noted that a state may properly have an interest in protecting the health of the mother, maintaining certain medical standards, and in "protecting potential life." *Id.* at 154.

73. *Id.* at 155. In other words, legislation restricting abortion is subject to strict scrutiny. *Id.*

74. *Id.* at 162-63. The Court laid out the trimester framework to determine at what point states may regulate abortion based on an interest in the health of the mother, and the interest in protecting potential life. *See id.* at 163. The Court held that the state's interest in protecting the health of the mother is sufficiently compelling at the end of the first trimester. *Id.* Thus, after the first trimester, a state may impose legislation that reasonably relates to protecting the health of the mother and is sufficiently narrow in meeting that interest.

75. *Id.* at 163. Justice Blackmun reasoned that viability is the point at which the fetus "has the capability of meaningful life outside the mother's womb." *Id.*

76. *Id.* at 164.

77. 505 U.S. 833 (1992). In the interim, however, there were three major Supreme Court decisions that barely maintained the constitutional right to an abortion. *See Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (maintaining the constitutional right to an abortion, but upholding legislation that imposed strict limitations on abortion rights, with a decision that appeared to be a 4-4-1 vote); *Thornburgh v. Am.*

The joint opinion of Justices O'Connor, Kennedy, and Souter reaffirmed the central holding in *Roe*.⁷⁹ That is, the Court affirmed the constitutional right to an abortion before viability without undue interference from state legislation, and recognized that a state has legitimate interests in the health of the mother and the potential life of the fetus from the outset of pregnancy.⁸⁰

Although the Court upheld the central holding of *Roe*, a woman's right to an abortion looked very different after *Casey*. *Casey* altered the holding in *Roe* in three significant ways. First, the joint opinion gave wider latitude to a state's ability to regulate abortion.⁸¹ The only provision of the Pennsylvania statute that the Court struck was the provision requiring a woman to notify her husband before procuring an abortion.⁸² Unlike *Roe* where the Court held that a state could not enact legislation regulating abortion during the first trimester, the Court in *Casey* concluded that a state does have an interest in the potential life from the *outset* of the pregnancy,⁸³ and thus some regulation even at the earliest stages of pregnancy is permissible.⁸⁴ According to the joint opinion, the right to an abortion involves the "woman's right to make the ultimate decision, not a right to be insulated from all others in doing so."⁸⁵

Additionally, *Casey* changed the standard of review required of abortion legislation. Rather than requiring strict scrutiny, *Casey* applied the undue burden standard.⁸⁶ The undue burden standard merely prohibits "a state regulation ha[ving] the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."⁸⁷ This change in the standard used to reconcile the state's interest with the woman's right to abortion

Coll. of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (upholding the constitutional right to an abortion by a 5-4 decision); *Akron v. Akron Ctr. for Reprod. Health, Inc.* 462 U.S. 416 (1983) (upholding the constitutional right to an abortion by a 6-3 decision).

78. See *Casey*, 505 U.S. at 844. First, a woman seeking an abortion had to be provided with certain information regarding abortion and other options, and then wait twenty-four hours before having an abortion. *Id.* Second, a minor had to obtain the consent of at least one parent or the approval of a judge before she could have an abortion. *Id.* Third, with few exceptions, a married woman seeking an abortion had to notify her husband. *Id.* Unless the woman had a medical emergency, she could not procure an abortion without fulfilling these requirements. *Id.* Finally, those who performed abortions had to file reports on the abortions they performed. *Id.*

79. *Id.* at 846.

80. *Id.*

81. See *id.* at 872-73, 876-77.

82. See *id.* at 879-901.

83. *Id.* at 869; see *supra* notes 72-76 and accompanying text (explaining that the Court in *Roe* held that the state's interest was only compelling after the first trimester, and even then, only for the health of the mother).

84. *Casey*, 505 U.S. at 872.

85. *Id.* at 877.

86. *Id.* at 876.

87. *Id.* at 877.

indicates that the Court no longer acknowledged abortion as a fundamental right, because legislation regulating fundamental rights must be reviewed under strict scrutiny.⁸⁸

The third significant change in *Casey* was that the Court intimated an alternate constitutional basis for the right to an abortion. While *Roe* based the right to an abortion on privacy rights inherent in the Fourteenth Amendment's Due Process Clause,⁸⁹ the joint opinion in *Casey* rarely mentions privacy, and even where it does, it is merely a reference to a general right to privacy.⁹⁰

Instead, the opinions in *Casey* for the first time intimated that the Equal Protection Clause of the Fourteenth Amendment may provide a basis for the constitutional right to an abortion.⁹¹ The joint opinion states that "the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."⁹² Justice Stevens also stated that there would be enormous societal costs if *Roe* were overruled because it had become "an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women."⁹³ Thus, if the opportunity arises to reevaluate the right to an abortion, the Court may base the right on equal protection grounds.⁹⁴

II. THE PATH OF THE FUTURE: DIFFERING FEMINIST PERSPECTIVES ON HOW TO OBTAIN GENDER EQUALITY

Women have traveled far on the path to equality, but the road has been long and winding.⁹⁵ Women are not cohesive on which route to

88. See *supra* note 73 and accompanying text (explaining that *Roe* required strict scrutiny of abortion regulations). This wider latitude accorded to states to regulate abortion seemed to open the door for states to encourage responsibility, while not coercing conformity.

89. See *supra* text accompanying notes 66-71.

90. See *Casey*, 505 U.S. at 833.

91. See *id.* at 856; *id.* at 912 (Stevens, J., concurring in part and dissenting in part); *id.* at 928 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

92. *Id.* at 856.

93. *Id.* at 912 (Stevens, J., concurring in part and dissenting in part). Justice Blackmun also argued that restrictions on abortions "implicate constitutional guarantees of gender equality." *Id.* at 928 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

94. See *infra* note 241 and accompanying text.

95. Although women have been increasingly more prevalent in higher education and in the workplace, there is still a large gap in female representation in prominent positions. See Rhode, *Speaking of Sex*, *supra* note 16, at 141-42; Williams, *Unbending Gender*, *supra* note 12, at 105. For example, women make up forty-five percent of entrants to the bar, but account for only sixteen percent of full professors in law schools, thirteen percent of partners at large law firms, and eight percent of federal judges. Rhode, *Speaking of Sex*, *supra* note 16, at 141. Likewise, women make up one-third of all corporate managerial positions, but only five percent of senior

take, or on what the final endpoint actually is.⁹⁶ This conflict is part of the reason the quest for gender equality has slowed.⁹⁷

Abortion is another area where there is a split in feminist jurisprudence. A growing body of feminist literature favors grounding the right to an abortion in the Equal Protection Clause. The equal protection argument for abortion begins with the premise that, because only women can be pregnant, laws restricting abortion essentially target only women, thereby triggering equal protection.⁹⁸ In other words, disregarding the premise that abortion triggers equal protection is a failure to notice a legitimate difference between the sexes, which can lead to perpetuation of inequality.

This part will first discuss the equal treatment, or sameness, theory. Second, this part will explain the special treatment, or difference, theory. Third, this part will explore privacy and autonomy arguments for abortion. Finally, this part will examine critiques of the privacy argument and the equal protection argument for abortion.⁹⁹

A. Differing Perspectives of Feminism

Despite efforts to move beyond the sameness/difference debate, this conflict persists.¹⁰⁰ Essentially, the underlying conflict in this debate concerns the true meaning of equality: whether equality means applying the same rules to everyone, or having rules that affect everyone the same way.¹⁰¹ In other words, should the standard be equal treatment for the sexes, or are there times when special treatment may be necessary to even out existing inequalities or differences?¹⁰² Ultimately, this debate creates a "dilemma of difference"¹⁰³ where "we may recreate difference either by noticing or by ignoring it."¹⁰⁴

management in major companies. *Id.* at 142.

96. See *supra* text accompanying notes 7-9 (explaining that feminists disagree over what true equality means and how to achieve it).

97. See Selmi, *Family Leave*, *supra* note 11, at 709 (stating that "American society has failed to make more progress on the issues of gender equality in part because we remain conflicted about the role that women should play both in the workplace and the home").

98. See, e.g., Rhode, *Justice and Gender*, *supra* note 13, at 119 ("The notion that distinctions based on pregnancy were not distinctions based on 'gender as such' obscured the most basic physical, cultural, and historical meanings of reproduction.").

99. For a critique of the equal protection argument, see *infra* Part III.A.2.

100. See, e.g., Williams, *Dissolving the Sameness/Difference Debate*, *supra* note 6 at 296-97.

101. John E. Morrison, *Viva La Diferencia: A Non-Solution to the Difference Dilemma*, 36 *Ariz. L. Rev.* 973, 973-74 (1994).

102. Williams, *Unbending Gender*, *supra* note 12, at 205; Morrison, *supra* note 101, at 974.

103. Morrison, *supra* note 101, at 974 (quoting Minow, *supra* note 103, at 20).

104. *Id.* (quoting Martha Minow, *Making All the Difference: Inclusion, Exclusion, and the American Law* 20 (1990)).

Some scholars have asserted that occasionally differences must be considered, but at other times ignored.¹⁰⁵ Either improperly noticing difference, or improperly ignoring difference, can result in unequal treatment.¹⁰⁶ Treating people as if they are equal when in fact they are not results in continuation of that inequality.¹⁰⁷ At the same time, treating people as if they are not equal when in fact they are equal is discriminatory.¹⁰⁸

Biology often is used as a basis for acknowledging supposedly legitimate differences.¹⁰⁹ There is, however, a tendency to translate legitimate biological distinctions into illegitimate social distinctions.¹¹⁰ These social differences are usually an outgrowth of women's reproductive capacities.¹¹¹ Most commonly, the fact that only women can bear children leads to women being primarily responsible for childrearing.¹¹²

1. The Equal Treatment/Sameness Theory

Equal treatment arguments are based on the notion that men and women are essentially the same and that the law should not make any distinctions between the sexes.¹¹³ Sameness feminists contend that gender-specific special treatment laws or protective legislation reinforce stereotypical views and create a "more separate than equal"

105. *See id.*

[T]here are two ways of treating people unequally. One is to treat people equally, when they are not. For example, it is unfair . . . to schedule little league teams to play professional teams. Another way is to treat people differently, when they are not. Thus it is unfair . . . to create different leagues for African-American and Euro-American players. . . . [When people are not similarly situated, the solution is to] create rules separating the groups and then establish different rules for the different groups so that the opportunities and obstacles are the same for members of both groups. [When people are similarly situated, the solution] is to abolish all separations and to treat everyone [in the same way]. In short, one set of rules applies to everyone.

Id.

106. *See id.*; Williams, *Dissolving the Sameness/Difference Debate*, *supra* note 6, at 298.

107. *See* Morrison, *supra* note 101, at 974; Williams, *Dissolving the Sameness/Difference Debate*, *supra* note 6, at 298; *see also* Mark M. Hager, *Sex in the Original Position: A Restatement of Liberal Feminism*, 14 Wis. Women's L.J. 181 (1999).

108. *See* Morrison, *supra* note 101, at 974.

109. *See* Cass R. Sunstein, *The Partial Constitution* 274 (1993).

110. *See id.* (explaining how biological differences can be turned into social disadvantages); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 Yale L.J. 1281, 1308 (1991); *see also infra* text accompanying notes 173-74 (suggesting that the Court in *Nguyen v. INS* misconstrued a stereotype as a biological difference).

111. *See* Sunstein, *supra* note 109, at 274.

112. *See* MacKinnon, *supra* note 110, at 1312-13.

113. *See, e.g.,* Kaminer, *supra* note 31, at 9.

society.¹¹⁴ Hence, sameness feminists typically want laws that distinguish between men and women to be subjected to heightened scrutiny.¹¹⁵

Equal treatment arguments do not ignore that there may be real differences between men and women.¹¹⁶ Equal treatment does assert that these differences do not permit the law to treat men and women differently.¹¹⁷ Natural differences are merely outlines for human potential.¹¹⁸ Existing differences between men and women are further shaped by society and culture.¹¹⁹ Moreover, justice should not be confused with nature.¹²⁰ As Wendy Kaminer notes, "[j]ustice doesn't simply accommodate nature by codifying natural inequities. Justice tames nature with a cultural idea of what's fair."¹²¹ Differences exist between all people, not just the sexes.¹²² Women may be just as different from one another as they are from men.¹²³ These differences do not necessarily justify applying different rules for different genders.¹²⁴

Equal treatment proponents contend that preferential treatment "is a short-term solution that perpetuates the problem, trapping women in a cycle of legal privileges and institutionalized discrimination. . . . Feminists have to find a way to compensate women for discrimination

114. See Rhode, *Justice and Gender*, *supra* note 13, at 121. For example, as one commentator argues, "to require that employers offer maternity but not necessarily paternity or parental leaves is to reinforce, both in fact and appearance, unequal allocations of family responsibilities." *Id.* at 122. Implying that infants are primarily a mother's responsibility discourages, or at least does not demand, employers to provide or men to seek parental accommodations. *See id.*

115. Women originally fought for strict scrutiny, but settled for intermediate scrutiny in *United States v. Virginia* in order to get a majority vote. *See United States v. Virginia*, 518 U.S. 515 (1996); *see also* Cary & Peratis, *supra* note 27, at 28 (advocating for sex to be a suspect class that would trigger strict scrutiny); *infra* text accompanying notes 153-55.

116. *See* Kaminer, *supra* note 31, at 9.

117. *See* *Frontiero v. Richardson*, 411 U.S. 677, 686-88 (1973); Kaminer, *supra* note 31, at 9. Although there may be some differences between men and women, "sex . . . frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members." *Frontiero*, 411 U.S. at 686-87 (footnote omitted).

118. *See* Kaminer, *supra* note 31, at 9.

119. *See id.*

120. *Id.*

121. *Id.*

122. *See id.* at 9-10.

123. *Id.* at 9-10, 29. *But see* Joan C. Williams, *Feminism and Post-Structuralism*, 88 Mich. L. Rev. 1776, 1784 (1990) (reviewing Zillah R. Eisenstein, *The Female Body and the Law* (1988)) [hereinafter Williams, *Feminism and Post-Structuralism*] (noting that although differences may exist between women, they are not as fundamental as the differences between men and women).

124. *See* Kaminer, *supra* note 31, at 9-10.

without compromising their fight for equality."¹²⁵ The equal treatment view is not one that "caters to women."¹²⁶ It is one where "rights, opportunities, and power will be distributed without regard to sex."¹²⁷ Under such a system, some men will be better off than some women, and some women will be better off than some men.¹²⁸ A person's success will be the natural result of his or her capabilities rather than a system skewed towards favoring one sex over the other.¹²⁹

Equal treatment proponents claim that protectionist laws are mostly used against women.¹³⁰ "Special protections for women are never entirely benign; instead they become self-fulfilling prophecies about women's inability to compete that perpetuate the dual labor market."¹³¹ Special treatment provisions that cater to women's needs also encourage employers to hire men in preference to women.¹³² Equal treatment adherents would construct "a new androgynous norm, a single standard of law and behavior broad enough to encompass the diverse needs and experiences of both sexes."¹³³

Landmark cases of the 1970s, such as those championed by Ruth Bader Ginsburg, "suggest that whether or not there are differences between them, men and women ought to be treated as individuals and not [as] emblems of sex and gender."¹³⁴ For example, in 1971 the United States Supreme Court held for the first time that a law violated the Equal Protection Clause because it treated men and women differently solely based on their sex.¹³⁵ *Reed v. Reed* involved an Idaho law that established a preference for men over women as administrators of decedents' estates.¹³⁶ The Court indicated that an arbitrary preference for members of one sex over the other is an impermissible classification that violates the Equal Protection Clause of the Fourteenth Amendment.¹³⁷

125. *Id.* at 10.

126. *Id.* at 11.

127. *Id.*

128. *See id.*

129. *See id.*

130. *Id.* at 62.

131. *Id.*

132. *See Selmi, Family Leave, supra* note 11, at 751. If employers are required to provide special treatment for female employees but not male employees, they may be less willing to hire a female when she is equally qualified or even slightly more qualified. *See id.* Moreover, law firms have considered terminating part-time policies because part-time employees, though still profitable, are less profitable than full-time employees. *Estrich, supra* note 6, at 158.

133. Kaminer, *supra* note 31, at 62.

134. *Id.* at 29.

135. *Reed v. Reed*, 404 U.S. 71, 76-77 (1971); *see Cary & Peratis, supra* note 27, at 25.

136. *Reed*, 404 U.S. at 73.

137. *Id.* at 76-77 ("To give a mandatory preference to members of either sex over members of the other . . . is to make the very kind of arbitrary legislative choice

The Court's decision in *Frontiero v. Richardson*¹³⁸ was another victory for equal treatment proponents.¹³⁹ In *Frontiero*, a female lieutenant challenged a law that automatically provided certain benefits for servicemen's wives but not servicewomen's husbands.¹⁴⁰ A servicewoman had to prove that her husband depended on her for over one-half of his support.¹⁴¹

The *Frontieros* asserted that this law was discriminatory in two ways.¹⁴² First, the dependency test was imposed only on servicewomen and not servicemen.¹⁴³ Second, a serviceman whose wife was not dependant for more than one-half of her support received benefits whereas a servicewoman's husband who was similarly situated would not receive such benefits.¹⁴⁴

The government conceded that the differential treatment served no purpose other than mere "administrative convenience."¹⁴⁵ The plurality opinion states that although efficacious administration of governmental programs has some value, "the Constitution recognizes higher values than speed and efficiency."¹⁴⁶ Thus, the plurality concluded that any law which "draws a sharp line between the sexes" for the sole purpose of administrative convenience impermissibly commands different treatment for similarly-situated men and women, and therefore, is an arbitrary legislative choice forbidden by the Constitution.¹⁴⁷

Laws such as the one at issue in *Frontiero* are based on stereotypical views of the roles of men and women and tend to perpetuate discrimination against women. Although "such discrimination was [traditionally] rationalized by an attitude of 'romantic paternalism,'" the practical effect of protective laws "put women, not on a pedestal, but in a cage."¹⁴⁸ Hence, the plurality would have applied strict judicial scrutiny to sex-based classifications.¹⁴⁹

forbidden by the Equal Protection Clause of the Fourteenth Amendment . . .").

138. 411 U.S. 677 (1973).

139. *Frontiero* fell just one vote short of establishing strict scrutiny as the standard of review for sex-based classifications. See *id.* A plurality opinion signed by four of the justices stated that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." *Id.* at 688.

140. *Id.* at 678.

141. *Id.* at 678-79, 680.

142. *Id.* at 680.

143. *Id.*

144. *Id.*

145. *Id.* at 688.

146. *Id.* at 690 (quoting *Stanley v. Illinois*, 405 U.S. 645, 656 (1972)).

147. *Id.*

148. *Id.* at 684.

149. *Id.* at 688.

The most recent victory for equal treatment proponents was the Court's decision in *United States v. Virginia* ("VMP").¹⁵⁰ Specifically, the Court held that the Virginia Military Institute could not operate as a male-only institution.¹⁵¹ Moreover, Virginia's remedial plan, creating a separate, comparable institute for women, Virginia Women's Institute for Leadership ("VWIL"), was not a sufficient remedy.¹⁵²

The true victory in *VMI*, however, was that the Court declared that laws which make distinctions between the sexes are subject to intermediate scrutiny.¹⁵³ "The heightened review standard . . . does not make sex a proscribed classification,"¹⁵⁴ but it does mean that sex-based "classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women."¹⁵⁵

In its most recent decision concerning gender equality, however, the Court retreated from an equal treatment approach. *Nguyen v. INS* upheld a law that imposed different requirements for proof of paternity and maternity, when a child was born overseas and out of wedlock, with one parent being a citizen and the other parent being an alien.¹⁵⁶ The majority held that the sex-based distinction satisfied two important governmental objectives.¹⁵⁷

The first governmental interest was assuring that the asserted father was in fact the child's biological father.¹⁵⁸ The Court held that a mother's proof of biological maternity was satisfied by the birth itself.¹⁵⁹ Biological paternity, however, is not provable by birth

150. 518 U.S. 515 (1996).

151. *Id.* at 534.

152. *Id.* at 551-56. "A remedial decree . . . must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage 'in the position they would have occupied in the absence of [discrimination].'" *Id.* at 547 (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)) (alteration in original). The separate institute for women could not afford benefits comparable to those at VMI. *See id.* "VWIL's student body, faculty, course offerings, and facilities hardly match[ed] VMI's." *Id.* at 551. Likewise, VWIL graduates would not receive the benefits of the 157-year reputation of VMI, including benefits associated with "the school's prestige, and its influential alumni network." *Id.*

153. *See id.* at 533-34. Intermediate scrutiny requires a state to show that the challenged "classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at 533 (quotations omitted). Although feminists such as Justice Ginsburg argued that sex should be subject to strict scrutiny, that position never won a majority of the votes of the Court. Estrich, *supra* note 6, at 60; *supra* text accompanying notes 148-49. Although women originally fought for strict scrutiny, intermediate scrutiny was the compromise established in *VMI*. *VMI*, 518 U.S. at 533; *see supra* note 139 and accompanying text.

154. *VMI*, 518 U.S. at 533.

155. *Id.* at 534 (citation omitted).

156. *Nguyen v. INS*, 533 U.S. 53 (2001).

157. *Id.* at 62-70.

158. *Id.* at 62.

159. *Id.* ("The mother's status is documented in most instances by the birth

itself.¹⁶⁰ The majority concluded that mothers and fathers are not similarly situated when it comes to proving biological parenthood, and that applying a different set of rules for mothers and fathers was therefore "neither surprising nor troublesome from a constitutional perspective."¹⁶¹

The second governmental interest furthered by the sex-based classification was to ensure that the citizen parent maintained "real, everyday ties" with the child.¹⁶² This was so that the parent would have the opportunity to develop a close connection with the child.¹⁶³ The majority assumed that the potential for this relationship is made possible between the child and mother simply by the mother giving birth to the child.¹⁶⁴ An unwed father, however, was not presumed to have the same opportunity to develop a meaningful relationship with his child.¹⁶⁵

In a dissent joined by Justices Souter, Ginsburg, and Breyer, Justice O'Connor stated that although the Court claimed to invoke the heightened scrutiny standard, the majority departed from heightened scrutiny analysis and upheld a sex-based classification that did not further important governmental interests.¹⁶⁶ The dissent stated that if the first asserted governmental interest is in fact the prevention of fraudulent conveyances of citizenship, the majority failed to elaborate on the importance of that interest; nor did the majority portray that this was in fact an actual purpose of the statute.¹⁶⁷ Additionally, the Immigration and Naturalization Service ("INS") did not claim to rely on this interest to sustain the sex-based classification.¹⁶⁸ The dissent also criticized the majority for dismissing the availability of sex-neutral alternatives as irrelevant.¹⁶⁹

certificate or hospital records and the witnesses who attest to her having given birth.").

160. *Id.*

161. *Id.* at 63.

162. *Id.* at 64-65.

163. *Id.*

164. *See id.* at 65.

In the case of a citizen mother... the opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth, an event so often critical to our constitutional and statutory understandings of citizenship. The mother knows that the child is in being and is hers and has an initial point of contact with him.

Id.

165. *Id.*

166. *Id.* at 74 (O'Connor, J., dissenting). "In all, the majority opinion represents far less than the rigorous application of heightened scrutiny that our precedents require." *Id.* at 79 (O'Connor, J., dissenting).

167. *Id.* at 79 (O'Connor, J., dissenting).

168. *Id.* (O'Connor, J., dissenting).

169. *Id.* at 81-82 (O'Connor, J., dissenting) ("In our prior cases, the existence of comparable or superior sex-neutral alternatives has been a powerful reason to reject a sex-based classification.").

Regarding the second asserted governmental interest, the dissent questioned whether having the *opportunity* to develop a meaningful relationship qualifies as an important interest.¹⁷⁰ The dissent suggested that by "focusing on opportunity rather than reality," the majority widened the gap between the discriminatory means and the asserted ends, thus diluting the importance of the actual governmental interest.¹⁷¹ As with the first interest, the dissent again criticized the majority for failing to acknowledge sex-neutral alternatives that would equally, if not better, serve the asserted interests.¹⁷²

Perhaps most importantly, the dissent noted that the second asserted interest is not supported by any

biological differences but instead [by] a stereotype *i.e.*, the generalization that mothers are significantly more likely than fathers . . . to develop caring relationships with their children. Such a claim relies on the very stereotype the law condemns, lends credibility to the generalization, and helps to convert that assumption into a self-fulfilling prophecy.¹⁷³

In sum, the dissent argued that the statute is based on overbroad, outdated generalizations about the sexes and the government did not put forth sufficient explanations that would satisfy the burdens required by heightened judicial review.¹⁷⁴ *Nguyen* therefore indicates that the current Court may uphold laws that distinguish between the sexes, whether or not a legitimate biological difference justifies the distinction.

2. The Special Treatment/Difference Theory

Special treatment, or difference, feminists assert that to deny that women are different from men and to treat them the same as men is a form of discrimination.¹⁷⁵ Such adherents intimate that treating women equal to men is actually treating them as if they are men.¹⁷⁶ Difference theory maintains that there are fundamental differences between men and women,¹⁷⁷ and ignoring those differences places women at a disadvantage.¹⁷⁸

170. *Id.* at 84 (O'Connor, J., dissenting).

171. *Id.* (O'Connor, J., dissenting).

172. *Id.* at 86 (O'Connor, J., dissenting).

173. *Id.* at 89 (O'Connor, J., dissenting) (citations and quotations omitted) (omission in original).

174. *See id.* at 90 (O'Connor, J., dissenting).

175. *See, e.g.,* Langston, *supra* note 6, at 5; *supra* notes 101-08 and accompanying text.

176. *See* Langston, *supra* note 6, at 5.

177. *See supra* note 123.

178. *See* Langston, *supra* note 6, at 10.

Difference feminists emphasize that men and women are not similarly or equally situated in society.¹⁷⁹ They argue that there is a hierarchical power structure, and this power structure results in more inequality.¹⁸⁰

Notably, some difference feminists purport that the differences between men and women are not limited to biology.¹⁸¹ Rather, they contend that men and women differ emotionally and in the way they view the world.¹⁸² Therefore, this group of feminists wants the law to recognize not only biological distinctions between men and women but cultural differences as well.¹⁸³

Special treatment laws have their roots in the protectionist laws established early in the twentieth century.¹⁸⁴ These laws were thought to be necessary to compensate for inequities in society and for inequities resulting from women's reproductive roles.¹⁸⁵ Difference feminists argue that equal treatment proponents, or sameness feminists, do not account for the structural disadvantages of women that are built into "male" norms.¹⁸⁶ Special treatment proponents believe that there are fundamental differences between men and women, and thus, treating women as if they are the same as men is a form of discrimination that results in inequality.¹⁸⁷

Difference feminists maintain that protectionist laws, or special treatment provisions, are particularly necessary in the workplace.¹⁸⁸ Women's reproductive roles create a work/family conflict that especially impacts mothers.¹⁸⁹ Special treatment advocates contend that working men and working women differ regarding reproduction.¹⁹⁰ Without any parental provisions, although both sexes

179. See *id.* at 5.

180. See *id.*

181. *Id.*; see Hager, *supra* note 107, at 182.

182. See Hager, *supra* note 107, at 182; Langston, *supra* note 6, at 6.

183. See Langston, *supra* note 6, at 10 (discussing how special treatment recognizes the disadvantage of sameness, and how being treated as if you are the same "when in fact, you differ in significant ways, 'is just as discriminatory as being penalized directly for your difference'" (quoting Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 Colum. L. Rev. 1118, 1154 (1986))).

184. See *supra* Part I.A.

185. See Kaminer, *supra* note 31, at 62.

186. Williams, *Dissolving the Sameness/Difference Debate*, *supra* note 6, at 302. But see *id.* at 302-04 (discussing how difference arguments function to veil underlying structural differences that disadvantage women). "[B]oth sameness and difference are equally vulnerable to being used to reinforce the status quo, and for the same reason: neither formulates a direct challenge to the structures that disadvantage outsiders." *Id.* at 305.

187. See Williams, *Feminism and Post-Structuralism*, *supra* note 123, at 1783-84, 1788.

188. See Williams, *Unbending Gender*, *supra* note 12, at 217-20 (discussing views of difference feminists, or special treatment proponents).

189. See *id.* at 217-19.

190. Rhode, *Justice and Gender*, *supra* note 13, at 120.

may suffer hardships, women are particularly injured.¹⁹¹ Therefore, special treatment provisions are necessary for women to be able to compete effectively in the workplace.¹⁹² For example, many law firms have begun to accommodate women with children by establishing part-time work programs.¹⁹³ These programs are designed to enable women to maintain a successful career while fulfilling familial obligations.¹⁹⁴

Additionally, Edward McCaffery has suggested a special treatment tax law for women.¹⁹⁵ McCaffery argues that tax penalties on secondary income earners disproportionately affect women, because married women often earn less than their husbands.¹⁹⁶ McCaffery therefore proposes that married women be taxed at a lower rate in order "to encourage more women to enter, or remain in, the labor force."¹⁹⁷

B. Abortion Arguments: Privacy and Autonomy vs. Equal Protection

The right to an abortion has been grounded in various theories. There are two competing arguments for the right to an abortion: one based on privacy and the other based on equal protection.¹⁹⁸ This section first explores the privacy and autonomy argument for abortion. Next, this section analyzes critiques of the privacy argument. Finally, this section explains several equal protection arguments for the constitutional right to an abortion.¹⁹⁹

191. *Id.*

192. *See id.* at 120-21. Some scholars, however, would limit gender-specific provisions to childbearing needs, and would have gender-neutral parental provisions for childrearing needs. *Id.*

193. *See, e.g.,* Leslie Bender, *Sex Discrimination or Gender Inequality?*, 57 Fordham L. Rev. 941, 943 (1989).

194. Although such programs may seem to help promote equal protection of women by enabling women with children to have a more flexible work schedule, equal treatment proponents would contend that "[t]his is a mixed blessing for career women." *Id.* "[F]irms may use [participation in such programs] to legitimate glass ceiling barriers to promotion, firm power, salary and prestige, creating a new substratum that will be largely populated by women." *Id.* at 943-44 (quotation omitted).

195. Selmi, *Family Leave*, *supra* note 11, at 768.

196. *Id.*

197. *Id.* Equal treatment advocates likely would note that such a provision discriminates in a strikingly similar way to the law at issue in *Frontiero*. *See supra* text accompanying notes 142-44. Lower income husbands would not receive the same benefit, and married women who have higher incomes than their husbands receive an unfair advantage. *See supra* text accompanying notes 142-44.

198. *See supra* text accompanying notes 66-71 (explaining the privacy argument for the right to abortion in *Roe*); *supra* text accompanying notes 90-93 (discussing equal protection arguments for the right to abortion in *Casey*).

199. Equal protection arguments are critiqued in Part III.A.

1. Privacy and Autonomy Arguments

The privacy argument for abortion is based on the premise that there is a guarantee of liberty in the Due Process Clause of the Fourteenth Amendment. This liberty entails a right to privacy and autonomy. "The woman's constitutional liberty interest also involves her freedom to decide matters of the highest privacy and the most personal nature."²⁰⁰ "One aspect of this liberty is a right to bodily integrity, a right to control one's person."²⁰¹ "[P]ersonal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of government."²⁰² Restrictions on abortion violate the right to privacy in two ways.²⁰³ First, denying a woman the right to choose whether or not to procure an abortion infringes upon her right to bodily integrity, forcing significant physical intrusions upon the woman.²⁰⁴ Second, denying the woman the right to make decisions regarding reproduction and family planning denies her critical life choices that the "Court long has deemed central to the right to privacy."²⁰⁵

Ronald Dworkin supports the privacy argument for abortion and believes that the "right of procreative autonomy follows from any competent interpretation of the due process clause and of the Supreme Court's past decisions applying it."²⁰⁶ Dworkin argues that the Due Process Clause of the Fourteenth Amendment selects certain freedoms, such as the freedom to procure an abortion, and makes them specific constitutional rights that a state cannot restrict or override unless it has a compelling reason for doing so.²⁰⁷ According to his reasoning, abortion rights are safeguarded by the right to privacy, which is inherent in the concept of ordered liberty and personal autonomy.²⁰⁸ The decision to procure an abortion is at least as private as decisions involving contraception, and decisions involving contraception have been protected under the theory of privacy.²⁰⁹

Dworkin further explains that the right to an abortion is a necessary component of autonomy.²¹⁰ "[I]ntegrity demands general recognition

200. *Planned Parenthood v. Casey*, 505 U.S. 833, 915 (1992) (Stevens, J., concurring in part and dissenting in part).

201. *Id.*

202. *Id.* at 927 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citation omitted).

203. *Id.*

204. *Id.*

205. *Id.*

206. Dworkin, *supra* note 7, at 160, 168.

207. *See id.* at 106-07.

208. *Id.* at 104-07, 116-17, 128, 157-59, 166.

209. *Id.* at 106-07; *see Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

210. Dworkin, *supra* note 7, at 157-59.

of the principle of procreative autonomy, and therefore of the right of women to decide for themselves not only whether to conceive but whether to bear a child."²¹¹ Abortion "involves a woman's control not just of her sexual relations, but [also] of changes within her own body."²¹²

Moreover, in some cases, it may not be medically possible to distinguish abortion from some forms of contraception because some contraception mechanisms, such as intrauterine devices and some forms of birth control pills, act as abortifacients, destroying fertilized ova if they fail to prevent fertilization.²¹³ Dworkin notes that very few people, if any, believe that the Court's contraception decisions should be overruled.²¹⁴ He further acknowledges the appeal of a political compromise that supports the right to contraception, but not to abortion.²¹⁵ "But the point of integrity—the point of law itself—is exactly to rule out political compromises of that kind."²¹⁶

Dworkin concludes that the right to procreative autonomy has an important place in our Constitution and in our political culture.²¹⁷ Most importantly, our culture centers on a belief in human dignity, "that people have the moral right—and the moral responsibility—to confront the most fundamental questions about the meaning and value of their own lives for themselves, answering to their own consciences and convictions."²¹⁸ Thus, the right to decide whether to have an abortion is a necessary component of personal autonomy and is therefore included in the Due Process Clause of the Fourteenth Amendment.

211. *Id.* at 159.

212. *Id.* at 107.

213. *Id.*

214. *Id.* at 158.

215. *Id.*

216. *Id.* Additionally, Dworkin contends that the right to an abortion is supported not only by the Fourteenth Amendment, but also by the First Amendment. *Id.* at 160-68. "Locating the abortion controversy in the First Amendment will seem natural to people who instinctively perceive that the controversy is at bottom a religious one." *Id.* at 160. Dworkin suggests that the moral issues that are intertwined with abortion decisions are essentially religious issues. *Id.* at 158. They deal with "the ultimate purpose and value of human life itself." *Id.* To permit the state to curb these rights is to grant the state "the general power to dictate to all citizens what respect for the inherent value of human life requires." *Id.* "[B]elief[s] in the objective and intrinsic importance of human life [have] a distinctly religious content." *Id.* at 163. "The First Amendment prohibits government from establishing any religion, and it guarantees all citizens the free exercise of their own religion." *Id.* at 160. Legislation that demonstrates the government's support of one side of an essentially religious issue violates both of the First Amendment religion clauses. *Id.* at 162.

217. *Id.* at 166.

218. *Id.*

2. Critiques of the Privacy Argument and Equal Protection Arguments

Another group of theorists argues that the Equal Protection Clause of the Constitution more aptly supports the right to an abortion. Some of these theorists contend that basing the right to an abortion on the right to privacy is unfounded, or does not solve the true problem that creates women's need for abortion rights.²¹⁹ A second group of theorists which favors the equal protection argument for abortion suggests that the privacy argument, though not completely unsupported, provides weaker support for abortion than does equal protection.²²⁰ This section first explains why some theorists disagree with using privacy arguments to support abortion rights, and then analyzes equal protection arguments for the right to an abortion.

Professor Catharine MacKinnon opposes using the right to privacy as support for a constitutional right to an abortion and favors basing the right to abortion on equal protection grounds. Professor MacKinnon argues that the privacy argument for abortion neglects the fundamental inequality of male-female sexual relations, and creates the impression that states do not have an obligation to protect against domestic violence.²²¹ According to this theory, the privacy argument, by implying that whatever happens behind the bedroom door is private, creates a situation where the state lacks any responsibility to protect women from domestic violence.²²² Thus, MacKinnon fears that the right of privacy treats the home as free from intervention, thereby neglecting to protect women from such abuse.²²³ Accordingly, the right to privacy becomes more of an injury than a gift, leading to a situation where men can oppress women individually in their own homes.²²⁴

In support of this criticism, MacKinnon contends that, "the law's privacy is a sphere of sanctified isolation, impunity, and unaccountability."²²⁵ It belongs to the individual with power, and "[w]omen have been accorded neither individuality nor power."²²⁶ The privacy argument fails to reconcile this dichotomy of domination and subordination.²²⁷ Furthermore, "[s]exual violation symbolizes and actualizes women's subordinate social status to men."²²⁸ "Many of the

219. See *infra* notes 221-31 and accompanying text.

220. See *infra* notes 236-39 and accompanying text.

221. MacKinnon, *supra* note 110, at 1311.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* MacKinnon asserts that women have traditionally been dominated by men, and to a large extent, women are still considered a subordinate class. See *id.* at 1302.

227. See *id.* at 1311.

228. *Id.* at 1302.

social disadvantages to which women have been subjected have been predicated upon their capacity for and role in childbearing.”²²⁹ Privacy law, according to MacKinnon, is geared toward protecting men, allowing them to dominate women in private and to escape punishment under the law.²³⁰ Thus, “while the private has been a refuge for some, it has been a hellhole for others.”²³¹

The privacy argument is also commonly criticized for leading to the contention that a state can prohibit the use of public funds to finance abortions.²³² For example, some legal scholars suggest that the privacy argument led straight to the decision in *Harris v. McRae*²³³ where the Court upheld the Hyde Amendment, which prohibited public funds from being used to assist in financing abortions.²³⁴ Thus, critics of the privacy argument contend that privacy permits the state to coerce a woman into bearing a child by making abortion unaffordable.²³⁵

Cass Sunstein also criticizes the privacy argument, although he does not contend that the privacy argument is wrong or even unpersuasive.²³⁶ Rather, he asserts that the privacy argument cannot come to terms with the argument that the fetus is a constitutional person.²³⁷ Sunstein argues that, if it were accepted that a fetus is a person with rights of its own, then the privacy argument is not sufficient to justify the constitutional right to an abortion because the protection of the fetus’ right to life would be a compelling interest that is sufficient to withstand strict scrutiny.²³⁸ Therefore, although Sunstein would not completely reject the privacy argument, he prefers to rely on the Equal Protection Clause as providing the basis for a constitutional right to an abortion.²³⁹

3. Equal Protection Arguments for the Right to an Abortion

In *Casey*, the Supreme Court first intimated, and Justice Blackmun explicitly stated, that the right to an abortion may be necessary to

229. *Id.* at 1308; see *supra* notes 31-44 and accompanying text.

230. MacKinnon, *supra* note 110, at 1311.

231. *Id.*

232. See, e.g., Eileen L. McDonagh, *My Body, My Consent: Securing the Constitutional Right to Abortion Funding*, 62 Alb. L. Rev. 1057, 1065-66 (1999).

233. 448 U.S. 297 (1980).

234. See McDonagh, *supra* note 232, at 1065-66 n.49.

235. But see *infra* Part III.A (discussing how privacy does not lead to this contention; nor did it lead to the majority opinion in *Harris*).

236. See Sunstein, *supra* note 109, at 279.

237. See *infra* note 269 and accompanying text (discussing that Sunstein contends that the equal protection argument avoids the issue of whether the fetus is a person). But see *infra* notes 292-303 and accompanying text (explaining how the privacy argument actually avoids the argument that the fetus is a person and how the equal protection argument may be more vulnerable to the claim that the fetus is a person).

238. See Sunstein, *supra* note 109, at 271-85.

239. See *id.*

provide women with equal protection.²⁴⁰ Thus, *Casey* might be interpreted to imply that the Court is shifting towards the Equal Protection Clause as being the source of the right to an abortion. Justice Ginsburg's presence on the Supreme Court makes that possibility even more likely.²⁴¹

The equal protection argument for the constitutional right to an abortion is largely based on the notion that this biological difference between women and men turns into a social disadvantage for women.²⁴² Whether such inequality results from the fundamental inequality in male-female sexual relations,²⁴³ or because, after childbirth, women are more likely to have the primary responsibility of caring for the child,²⁴⁴ the fact remains that women often suffer social disadvantages due to their biological capacity to bear children.²⁴⁵

Professor MacKinnon argues that the right to an abortion needs to be based on equal protection grounds to compensate for the social and sexual inequality between men and women.²⁴⁶ Women have been subjected to a social history of disempowerment, exploitation, and subordination that extends into the present.²⁴⁷ Moreover, women have traditionally been left out of the lawmaking process, and therefore, laws were made using men and the traditional male role as the baseline for lawmaking.²⁴⁸ "No woman had a voice in the design of the legal institutions that rule the social order under which women, as well as men, live. Nor was the condition of women taken into account or the interest of women as a sex represented."²⁴⁹ Images of women traditionally connoted that women were a form of property, or were merely required to fulfill men's basic needs, just as food and sleep do.²⁵⁰ This inequality that the laws of our country were based on

240. See *supra* notes 91-93 and accompanying text.

241. Justice Ginsburg is considered a strong proponent for equal protection arguments. See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375 (1985). She was not a member of the Supreme Court when *Roe* was decided nor when *Casey* was decided. Therefore, if a similar case were to come before the Court today, there would likely be greater support for the equal protection argument as providing a basis for the constitutional right to an abortion.

242. Sunstein, *supra* note 109, at 274; see *supra* notes 109-10 and accompanying text.

243. MacKinnon, *supra* note 110, at 1311.

244. *Id.* at 1312.

245. *Id.* at 1308.

246. See *id.* at 1311-13.

247. *Id.* at 1298-99.

248. *Id.* at 1281-83.

249. *Id.* at 1281 (footnote omitted); see, e.g., *supra* text accompanying notes 27-29.

250. MacKinnon notes that Rousseau identified the "primitive passions as 'food, a female, and sleep.'" MacKinnon, *supra* note 110, at 1282 (quoting J. Rousseau, *The Social Contract and Discourses* 210 (G. Cole trans., 1950) (1762)).

continues today, and, according to MacKinnon, sexual inequality and violence further perpetuate social inequality.²⁵¹

Traditional gender roles conjure males as being the sexual aggressor, while females embody the role of the sexual victim, and this depiction, along with the incorporation of force into sexuality, has been "romanticized as acceptable."²⁵² Professor MacKinnon purports that men continue to use sex and sexual violence to dominate women, and thus, women are left powerless, fearful, and silenced.²⁵³

In social reality, rape and the fear of rape operate cross-culturally as a mechanism of terror to control women. . . . Rape is an act of dominance over women that works systemically to maintain a gender-stratified society in which women occupy a disadvantaged status as the appropriate victims and targets of sexual aggression.²⁵⁴

MacKinnon argues that women often do not control the situations under which they have sex, and thus, women are "systematically denied meaningful control over the reproductive uses of their bodies through sex."²⁵⁵ "If women are not socially accorded control over sexual access to their bodies, they cannot control much else about them."²⁵⁶ Men, by contrast, "are not comparably disempowered by their reproductive capacities. Nobody forces them to impregnate women."²⁵⁷ Unlike women, men are not typically forced to give up their life pursuits in order to care for children,²⁵⁸ nor do men with children face the same form of discrimination in the workplace or other public arenas.²⁵⁹ Thus, MacKinnon urges that abortion is needed as a step to give women control over their reproductive lives.²⁶⁰

Further, MacKinnon asserts that if abortion is considered as part of the goal of gender equality, there would be an incentive for legislation that promotes programs to support both the fetus and the woman, including funding for prenatal care, pregnancy leaves, and nutritional, alcohol, and drug counseling.²⁶¹ Additionally, laws that prohibit or restrict abortion would be held unconstitutional because they prohibit a procedure that only women need because of social conditions that have created sexual inequality.²⁶²

251. *Id.* at 1311-13.

252. *Id.* at 1302.

253. *Id.* at 1302; *see also id.* at 1312.

254. *Id.* at 1302.

255. *Id.* at 1312.

256. *Id.* at 1324.

257. *Id.* at 1313.

258. *Id.*

259. *Id.* at 1308-09.

260. *Id.* at 1318-19.

261. *Id.*

262. *See id.* at 1319-20.

Cass Sunstein also claims that the right to an abortion should be grounded in principles of equal protection.²⁶³ A basic tenet of Sunstein's argument is that the government should not be able to use the biological fact that only women can get pregnant as a source of social disadvantage.²⁶⁴ Sunstein claims that restrictions on abortion are a form of sex discrimination.²⁶⁵ If women do not have the right to procure an abortion, others can use their reproductive capacities as a mechanism for using and controlling women.²⁶⁶ Any restriction on abortion is a law targeted solely at women,²⁶⁷ and any law that specifically targets one sex is discrimination.²⁶⁸

Furthermore, Sunstein contends that a prohibition of abortion should be invalid "because it involves an impermissibly selective co-optation of women's bodies."²⁶⁹ The act of abortion is "a refusal to allow one's body to be devoted to the protection of another."²⁷⁰ A person seeking an abortion is refusing to allow her body to be conscripted for the use of another.²⁷¹ The law never compels a citizen to devote his or her body to the protection of another.²⁷² Therefore, a

263. Sunstein, *supra* note 109, at 272. Sunstein's argument differs, however, from MacKinnon's in a significant way. Sunstein's argument has been understood as a mainstreamed version of MacKinnon's. See generally Jeanne L. Schroeder, *The Taming of the Shrew: The Liberal Attempt to Mainstream Radical Feminist Theory*, 5 Yale J. L. & Feminism 123 (1992). To some, this may make the equal protection argument more palatable. To others, it may be the argument's greatest flaw. Further, the acceptance of Sunstein's argument over MacKinnon's may itself be viewed as a form of discrimination—that people only accept the argument when it is written in this mainstream style by a white male.

264. Sunstein, *supra* note 109, at 274.

265. *Id.* at 273.

266. *Id.* at 272.

267. *Id.* at 273.

268. *Id.* Sunstein acknowledges that abortion laws may punish individuals who perform abortions, whether they are women or men. *Id.* This does not mean, however, that the laws are gender-neutral, and therefore, not a form of gender discrimination. *Id.* Sunstein analogizes this situation to racial segregation laws, explaining that, although racial segregation laws may affect whites as well as blacks, they are still a form of racial discrimination. *Id.* at 273-74.

269. *Id.* at 272. Thus, Sunstein claims that the equal protection argument for abortion can withstand the argument that a fetus is a person. *Id.* at 280-81. Sunstein claims that equality arguments "make it unnecessary to take any position on the moral and political status of unborn life." *Id.* at 280. Even if the fetus were considered a person under the law, women's bodies could not be conscripted in order to protect them. *Id.*

270. *Id.* at 274.

271. *Id.*

272. *Id.* at 274-75. Sunstein does not suggest that the government cannot impose burdens on people's bodies, or even that the government may be wrong in doing so. *Id.* at 275. In fact Sunstein even states that

[p]erhaps government should do so more often, at least when the burden is small and the need is great. But government must be even-handed in its choices. An imposition on women but not on men violates the Equal Protection Clause even if a more general imposition would be unobjectionable or highly desirable.

restriction on abortion would mean that only women can be forced to use their bodies to protect another being.²⁷³ "The fact that similar impositions are not imposed in cases in which men are involved" is evidence that a restriction on abortion is a form of discrimination.²⁷⁴

III. EQUAL PROTECTION ARGUMENTS FOR ABORTION AND GENDER-SPECIFIC SPECIAL TREATMENT LAWS FAIL TO FURTHER GENDER EQUALITY

This part argues that the equal protection argument for abortion perpetuates stereotypical views of women and makes true gender equality more difficult to achieve. Further, the equal protection argument for abortion aggravates the work/family conflict and makes it more difficult for mothers to be equal members in the workplace. This part first explains why the privacy/autonomy argument should prevail as the better argument for women in the quest for gender equality. This part then argues that in order to further the progression towards gender equality, feminists need to agree to disagree on the sameness/difference debate and develop remedies that appeal to both groups of feminists. Lastly, this part puts forth several suggestions to achieve true gender equality.

A. The Failure of the Equal Protection Argument for Abortion to Truly Equalize: Covering Up Inequalities as Opposed to Achieving True Equality

This section first explains why common critiques of the privacy argument are unfounded. Second, this section argues that privacy and

Id. Sunstein explains that the problem with restrictions on abortion goes beyond the imposition that it puts on women's bodies. *Id.* The greater problem is that these restrictions are imposing "in a way that is intertwined with the impermissible prescription, by the law and thus the state, of different roles for men and women." *Id.* at 277. These different roles are part of the reason that women are subordinated to a second-class citizenship. *Id.* Thus, Sunstein argues, restrictions on abortion should be prohibited because they buttress such stereotypical ideas about the proper role of women. *Id.* "[T]he notion that women should be compelled to carry fetuses to term is a product of constitutionally unacceptable stereotypes about the proper role of women in society." *Id.*

273. See *id.* at 275.

274. *Id.* Sunstein notes that a father is never required to sacrifice part of his body for the sake of his child, not "even if [it involves], for example, a risk-free kidney transplant [that] is necessary to prevent the death of a child." *Id.* at 274. Sunstein does, however, acknowledge that only men are drafted, and that the draft is an imposition on men's bodies to protect the nation. *Id.* at 276. Yet, he contends that this "turns out not to be a counterexample at all." *Id.* Sunstein differentiates the two by stating that the draft is less invasive, or at least differently invasive, than a prohibition on abortion, "because the imposition on the body is wholly external." *Id.* More importantly, Sunstein notes that the male-only draft is similar to a prohibition on abortion in the sense that they both enforce stereotypical roles of men and women—with men belonging to the public sphere and women belonging to the domestic sphere. *Id.*

autonomy arguments for abortion accord greater recognition to the capabilities of women and greater credence to the true notion of equality, providing permanent support for the constitutional right to an abortion. Third, this section discusses how grounding the right to an abortion on equal protection accepts that women, or at least mothers, are subordinate to men and lack power to control their role in society. Finally, this section explains that the equal protection argument does not give sufficient protection to the right to an abortion.

1. Rebuttal of the Common Critiques of the Privacy Argument

Catharine MacKinnon asserts that the privacy argument is a poor basis for the right to an abortion because it permits domestic violence to evade the law.²⁷⁵ There is, however, no connection between the privacy involved in the decision to have an abortion and the government's role in the prevention of domestic violence. When two people voluntarily and consensually choose to have sexual intercourse, their decision is a private one. But when one person does not consent, privacy drops out of the equation entirely. Rape and sex are not the same thing, even if they involve the same act. Rape is the ultimate symbol of power over women, but sex is not. Although government may not prohibit a woman's procreative decisions involved with sex, this does not mean that government is excused from protecting women from rape and other forms of sexual or domestic violence.

Moreover, as Dworkin explains, MacKinnon conflates different types of privacy.²⁷⁶ MacKinnon's arguments suggest that she views privacy in the spatial sense.²⁷⁷ Under this view, privacy is seen as excluding the law from the home, in particular, from the marital bedroom.²⁷⁸ But, privacy in relation to abortion means something different: "it means sovereignty over personal decisions."²⁷⁹ This privacy, which accords sovereignty in the decision to have an abortion, does not mean that there is also a territorial privacy, where the law would be indifferent to whether a spouse is abused.²⁸⁰ Thus, MacKinnon's argument, that recognizing a right to privacy discourages the legal protection of women from domestic violence, relies on her mistaken belief that privacy refers to spatial privacy.²⁸¹

275. See *supra* text accompanying notes 221-31.

276. Dworkin, *supra* note 7, at 53.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.* Furthermore, Justice Blackmun explained that the privacy involved in the right to an abortion is inherently different from that involved in marital intimacy. *Roe v. Wade*, 410 U.S. 113, 159 (1973). Moreover, the Court acknowledged that the right

The argument that privacy fails to place an obligation on states to assist in financing abortions is also unfounded.²⁸² Although some legal scholars argue that the holding in *Roe* led straight to the majority's decision in *Harris v. McRae*,²⁸³ some of the dissenters in *Harris* (Justices Blackmun, Brennan, and Stevens) were proponents of the right to abortion based on the Due Process Clause, and some of the most avid critics of *Roe* (Chief Justice Rehnquist and Justice White) joined in the majority opinion of *Harris*.²⁸⁴ Furthermore, as Justice Brennan's dissenting opinion in *Harris* aptly notes, the failure of the state to provide funds for medically necessary abortions is, in effect, coercing a woman to continue an unwanted pregnancy.²⁸⁵ Legislation that coerces women into choosing childbirth over abortion fails the strict scrutiny standard that was required by *Roe*,²⁸⁶ and would likely fail the undue burden standard established in *Casey*.²⁸⁷ Justice Brennan wrote that a state "must refrain from wielding its enormous power and influence in a manner that might burden the pregnant woman's freedom to choose whether to have an abortion."²⁸⁸ In fact, Justice Brennan stated that "the Hyde Amendment is nothing less than an attempt by Congress to circumvent the dictates of the Constitution and achieve indirectly what *Roe v. Wade* said it could not do directly."²⁸⁹ Thus, it appears that *Harris* was simply a bad decision, and not an inevitable consequence of the right to privacy.

Like Justice Brennan, Dworkin contends that the privacy argument in no way implies that states can, in effect, force a woman to elect childbirth over abortion by passing laws that deny funding for abortions.²⁹⁰ According to Dworkin, legislation that makes it difficult or prohibitively expensive to procure an abortion deprives women of their liberty and right to privacy under *Roe*.²⁹¹

Furthermore, there is little foundation for Cass Sunstein's proposition that privacy cannot withstand the argument that the fetus is a person,²⁹² while equal protection can.²⁹³ As Justice Stevens stated

to privacy and the woman's right to an abortion are not absolute. See *supra* notes 72-76 and accompanying text. If the state can regulate abortion due to an interest in the mother's health, certainly the right to privacy would not be so absolute as to forbid regulation of marital rape.

282. See *supra* notes 232-35 and accompanying text.

283. 448 U.S. 297 (1980); see *supra* text accompanying notes 233-35.

284. See *Roe*, 410 U.S. at 113; *Harris*, 448 U.S. at 297.

285. *Harris*, 448 U.S. at 330 (Brennan, J., dissenting).

286. See *id.*

287. See *Planned Parenthood v. Casey*, 505 U.S. 833, 876-77 (1992); *supra* text accompanying notes 86-87.

288. *Harris*, 448 U.S. at 330 (Brennan, J., dissenting).

289. *Id.* at 331. For more on the Hyde Amendment, see *supra* text accompanying notes 232-35.

290. Dworkin, *supra* note 7, at 103.

291. *Id.*

292. See *supra* notes 236-39 and accompanying text.

293. See *supra* note 269 and accompanying text.

in *Casey*, no Supreme Court opinion has ever based an argument against a constitutional right to an abortion on the ground that a fetus is a person with rights of its own.²⁹⁴ Likewise, Dworkin has said that no responsible lawyer would challenge *Roe* or *Casey* on the grounds that a fetus is a constitutional person.²⁹⁵ If a fetus were a person, then it would seem that states not only might be permitted to prohibit abortions, but that the federal government would be *required* to prohibit abortion, because it would be equivalent to murder.²⁹⁶ Those who oppose a constitutional right to an abortion typically prefer that the states be left to permit or prohibit abortions.²⁹⁷ Because it is unlikely that the Court would ever declare that a fetus is a constitutional person, it is also unlikely that the privacy argument would ever fail to justify a constitutional right to abortion because it cannot come to terms with the argument that a fetus is a person.

Even if a fetus were considered a person, however, the privacy argument still supports the right to an abortion. As Sunstein points out, people cannot be forced to use their bodies to save others.²⁹⁸ According to Sunstein's logic, therefore, government could not force women to use their bodies but not force men.²⁹⁹ The notion that people should not be forced to use their bodies to save the life of another, however, applies as equally to the privacy argument as it does to the equal protection argument.

Although the current law does not require people to use their bodies to save the life of another, Sunstein reasons that the law should perhaps require this when there is little imposition or risk, as long as the burden is placed equally on both men and women.³⁰⁰ Privacy and autonomy arguments, however, do not suggest that, as long as burdens are placed equally on men and women, the law can compel people to use their bodies to save another.³⁰¹ Moreover, pregnancy is not a

294. *Planned Parenthood v. Casey*, 505 U.S. 833, 913-14 (1992).

295. *See* Dworkin, *supra* note 7, at 110.

296. *See id.*

297. *See id.* at 102-03, 108-09, 110, 114-16.

298. *See supra* note 272 and accompanying text. It may, however, be argued that pregnancy, particularly a pregnancy that results from consensual sex, differs from other situations, such as witnessing a person being mugged. *See* Dworkin, *supra* note 7, at 111 (explaining that abortion might be characterized as more than merely a failure to aid, but instead a physical attack on a fetus, and further noting that, even if abortion were merely a failure to aid, parents do have a legal duty to protect their children). Sunstein's analogy, however, applies just the same. Even though parents may have a legal duty to protect their child, parents are not required to use their body to save their child's life, even when the physical burden is not severe. *See supra* note 274.

299. *See supra* notes 267-74 and accompanying text.

300. *See supra* note 272 and accompanying text.

301. Obviously, the burdens of pregnancy cannot be placed equally on men and women. According to Sunstein's reasoning, however, if fathers are in some way required to use their bodies for the sake of their child, then mothers might be forced to carry a pregnancy to term. *See supra* note 274 (explaining that abortion restrictions

minor imposition on a woman's body; nor is the risk inherent in pregnancy small enough that the woman should be forced to bear it. To imply that pregnancy might be the type of imposition that is minor enough that the law could reasonably or constitutionally require it to save the life of another is to be blind to the true burden of pregnancy.³⁰²

Nevertheless, the equal protection argument does not avoid criticism on the ground that a fetus is a person. If a fetus were considered a constitutional person, then a fetus would seemingly be denied its own equal protection rights, because it obviously is not capable of protecting its rights in a democratic system.³⁰³ Therefore, the equal protection argument may, in fact, be more vulnerable to attack on that issue than the privacy argument.

2. Privacy and Autonomy Arguments Prevail as the Better Argument for Women and Feminism

Privacy and autonomy arguments approach the right to abortion from a gender-neutral perspective, at least insofar as social roles are concerned.³⁰⁴ These arguments do not rely on the social roles of men or women, nor do they advocate for abortion primarily on the basis that women are in any way controlled by men. Rather, privacy and autonomy arguments are premised on the notion that continuing a pregnancy is a major life decision that women are capable of making. Accordingly, government should not force or coerce a woman's ultimate decision.

The idea that an individual should maintain control over her body and make decisions for herself regarding procreation is compelling. The burden and implications of pregnancy are great, and no law should require a person to serve as a human incubator. A woman's decision whether or not to bear a child should therefore be both private and autonomous.

While the privacy argument recognizes a woman's autonomy and affords sufficient protection to a woman's right to abortion, the equal protection argument does not. The latter fails to recognize the importance and seriousness of deciding to carry a pregnancy to term,

violate equal protection because a father is not required to undergo any physical burdens, such as a risk-free kidney transplant, to save his child).

302. It would seem that the type of reasonable imposition that the law could require is perhaps to call for help if a person was being attacked. Further, although abortion may be more than just a failure to aid, since the fetus places a severe physical burden on the mother, abortion might also be characterized as a form of self-defense. See *supra* note 298 and accompanying text.

303. See John T. Noonan, Jr., *The Root and Branch of Roe v. Wade*, 63 Neb. L. Rev. 668, 671-73, 678-79 (1984).

304. While not ignoring that abortion is primarily a women's issue, the privacy argument is not based on stereotypical roles or images of women in society.

regardless of the woman's situation in life. A major line of reasoning underlying the equal protection argument is that, absent abortion rights, women would be forced to become mothers and motherhood is thought to place women at a distinct disadvantage in society by hindering both their educational and professional pursuits.³⁰⁵ Mothers are considered to bear most of the weight of childrearing, which disables them from competing equally with men (even those that are fathers) in the workplace.³⁰⁶ Thus, equal protection proponents argue that abortion is necessary to allow women to postpone childbearing so that they can pursue the goals that motherhood hinders.³⁰⁷

Additionally, the equal protection argument is based on anti-caste principles, which indicate that the law must remedy the traditional subordination of women. As MacKinnon pointed out, the equal protection argument for abortion is meant to cure the sexual and societal domination of women by men.³⁰⁸ According to this argument, a history of sexual control by men has caused women to live as second-class citizens in fear of men.³⁰⁹ MacKinnon attacks men as a group for controlling women, raping or coercing them into having sex, and then disappearing when it comes to raising a child.³¹⁰

Doubtless, sexual violence is a problem in society, and women are the primary targets of such violence, but the notion that all men are responsible for this problem is as stereotypical as the notion that a woman's place is in the home. Attacking men as a class in such a manner is not only unfair to men, but is also dangerous for feminism and women's equality. Such arguments can alienate men who would otherwise support women's equality. Rather than fostering additional support for the equality of women and the right to an abortion, such extreme accusations against men create a situation where men are pitted against women. Feminism need not be regarded as purely a woman's issue: equality of the sexes benefits both men and women.³¹¹

Furthermore, although any woman who has walked a city street probably understands MacKinnon's argument that sexual violence has caused a fear in women that is not experienced by men,³¹² that fear of potential sexual violence does not in any way suggest that all or even a majority of women's sexual relations are unwanted or unequal. To suggest that women cannot or do not assert control over a significant

305. See *supra* notes 34-44, 91-93, 109-12, 177-78, 184-85, 188-97, 242-45, 258-59, 264-74 and accompanying text.

306. See *supra* notes 242-45, 258-59 and accompanying text.

307. See *supra* text accompanying notes 91-93.

308. See *supra* notes 246-62 and accompanying text.

309. See MacKinnon, *supra* note 110, at 1312-13; *supra* text accompanying notes 251-57.

310. MacKinnon, *supra* note 110, at 1313.

311. For a further discussion on how equality of the sexes benefits men as well as women, see Leo Kanowitz, *Equal Rights: The Male Stake* 9-16 (1981).

312. See *supra* notes 247-57 and accompanying text.

portion of their sexual relations reinforces stereotypical views of women as being meek and submissive.

Moreover, the equal protection argument only narrowly protects abortion rights and endangers the future of those rights should women achieve social equality. MacKinnon asserts that the primary reasons why that critique of the equal protection argument is not currently appropriate is because too much of sex is the result of rape or coercion.³¹³ Thus, MacKinnon's justification for abortion rights is largely based on a theory that most heterosexual sex is coercive and, therefore, abortion is necessary to provide women with control over their reproductive functions. But, if one rejects MacKinnon's theory of sex, the justification for abortion is lost because women have control over their reproductive functions by their ability to choose whether or not to have sex. Hence, MacKinnon's argument does not provide sufficient support for abortion rights outside the context of coercive sex.³¹⁴

Sunstein admits that the equal protection argument is more easily applied to cases where pregnancy resulted from rape or incest.³¹⁵ Most pregnancies, however, are not a result of rape or incest, and most women who seek an abortion are not pregnant due to rape or incest.³¹⁶ Sunstein even acknowledges that, "no one is likely to be in a good position to answer the question whether abortion should be available in a world of gender-based equality."³¹⁷

Further, MacKinnon argues that abortion rights are also justified because, after childbirth, women are primarily responsible for childrearing and suffer the disadvantages and discrimination that society imposes on mothers.³¹⁸ This argument, however, similarly endangers abortion rights as women gain social equality. As men begin to contribute more equally to childrearing, and as discrimination against mothers dissipates, support for abortion rights becomes weaker.

313. See *supra* text accompanying notes 253-57.

314. Dworkin, *supra* note 7, at 56 (explaining that, if, at some point, abortion rights are based on equal protection, then as women gain more control over their sexual relations, support for abortion rights becomes weaker because pregnancy would be more genuinely and unambiguously the woman's choice).

315. Sunstein, *supra* note 109, at 275.

316. See, e.g., Thomas L. Jipping, *Informed Consent to Abortion: A Refinement*, 38 Case W. Res. L. Rev. 329, 331 (1988) (noting that only two percent of abortions are performed as a result of rape or incest); Donald P. Judges, *Taking Care Seriously: Relational Feminism, Sexual Difference, and Abortion*, 73 N.C. L. Rev. 1323, 1416 n.316 (1995) (stating that even "[a]mong the small percentage of women whose pregnancy resulted from rape or incest, 95% reported at least one additional reason for the decision to abort").

317. Sunstein, *supra* note 109, at 279-80. But see *id.* at 281-82 (discussing whether abortion can be prohibited when pregnancy is a result of voluntary sex or even voluntary pregnancy).

318. See *supra* text accompanying notes 258-59.

Moreover, the equal protection argument endangers the right to abortion even at the present time. If the primary reason that a woman is entitled to an abortion is that she likely was coerced into having sex and did not have control over her pregnancy in the first place, or that she likely will be the primary caretaker, then perhaps states could limit abortion rights to such situations. Under such a system, a woman who voluntarily has sex, or perhaps intentionally gets pregnant, but then changes her mind, could be denied the right to an abortion. Similarly, a woman who becomes pregnant by a man who is willing to be the primary caretaker might be denied the right to have an abortion so that the father could raise the baby.

According to the equal protection theory, then, abortion is merely a means to repair women's situation in society based on discrimination. Therefore, abortion may be seen as a right limited to a time when women still experience discrimination. By contrast, the privacy argument is bound neither by a time limit nor by the individual circumstances of a particular woman. The privacy argument acknowledges that no woman, regardless of how powerless or powerful she may be, can be forced to have a baby. It protects women who intentionally get pregnant and then change their minds. It protects women who consensually have sex but accidentally get pregnant. It protects women who are pregnant due to rape or coercion. It protects women who are pregnant by men who are willing to support the baby. It protects all women, all the time.

For example, imagine the following three hypothetical women and consider how abortion rights apply to each of them differently.

Ashley: Ashley is a twenty-eight-year-old second-year associate at a large New York City law firm. She has been married to another lawyer, Michael, for three years. Ashley is two months pregnant and she and Michael have always wanted to have children. They both enjoy their careers, however, and do not want to sacrifice their professional pursuits to have children.

Amy: Amy is also a lawyer. She is twenty-six years old and currently clerking for a federal judge. She plans on working for a major law firm and hopes to be able to work in an international office. Amy is not married, though she has been dating her boyfriend for several months. Amy does not see marriage in her future. She wants to be free to travel and live abroad at will. Amy just found out she is pregnant.

Amanda: Amanda is a nineteen-year-old college student. Amanda knows she needs time to grow up and figure out what she wants to do in her life, but for now, she is enjoying college and plans to spend next semester studying abroad. She is not sure what she wants to do when she graduates, but she does know that having a successful career is important to her. Amanda also just found out that she is pregnant.

These three women are all different, but they have one thing in common—they are pregnant. Nevertheless, the pregnancy and its implications will affect them all very differently. Each has contemplated abortion as well as other options.

Ashley does not wish to have an abortion, but she also does not want to sacrifice her new career. She hopes to become a partner at her firm and she knows how difficult it is for women with children to become a partner. She does not want to work part time because she knows that this will essentially take her off the partner track.³¹⁹ Furthermore, she enjoys her work and does not want to take significant time off. Both Ashley and her husband want to take part in raising their child, but neither wants to sacrifice their career. They both hope that their employers will work with them to allow them to be good parents to their child as long as they maintain a superior quality of work. Ashley, however, doubts that this is realistic and is therefore seriously contemplating having an abortion. She is considering postponing parenthood until she becomes a partner, even if that creates the risk that she may never be able to have children.³²⁰

Abortion would not be a truly autonomous decision for Ashley because of her legitimate concern that, as a mother, she would be disadvantaged in the workplace. The workplace is geared towards men, or towards women who are not mothers.³²¹ Furthermore, men who are fathers typically have wives at home who do a majority of the domestic chores.³²² Ashley does not have this option. She and her husband are willing to share the domestic chores, but they both have demanding careers that would likely prevent them from being ideal workers and ideal parents at the same time. If abortion rights were grounded in a theory of equal protection, then Ashley would be justified in believing that for her to be an equal member at her workplace, she should not be a mother. Instead of fighting for equality in the workplace, the equal protection argument accepts the view that mothers are unequal to others in the workplace. Abortion for Ashley would not represent her ability to gain control over her reproduction and therefore become an equal member of society; it would simply represent her inability to be an equal member of society as a mother.

Amy, the twenty-six-year-old law clerk, has also contemplated having an abortion. Unlike Ashley, Amy does not know if she ever wants to have children, but is certain that she does not want them

319. See *supra* text accompanying note 13.

320. See Selmi, *Family Leave*, *supra* note 11, at 735 (noting that delaying childbirth may increase one's likelihood of never having children); see also Estrich, *supra* note 6, at 14 (describing the author's own fear that she would not be able to have a second child because she had delayed childbearing to pursue her career).

321. See *supra* notes 24-25 and accompanying text.

322. See *infra* text accompanying notes 339, 342.

now. Amy does not want to marry her current boyfriend, and although she could support a child financially, she does not think that she can be a good parent at this time. Amy's boyfriend has been supportive of her situation. He also does not want to get married now, but he has told Amy that if she wants to have the child, he is willing to share equally in childrearing.

Amy's desire to have an abortion would be representative of her autonomy because she is motivated by personal desires rather than being coerced into the decision out of fear of being an unequal member of society as a mother. At first glance, Amy appears to represent a woman who would benefit from the equal protection argument for abortion, because motherhood would interfere with her professional goals. At the same time, however, Amy did have control over the situation when she became pregnant. Further, although Amy does not want to marry the baby's father, he is willing to share equally in childrearing. Thus, if the equal protection argument were based on the theory that women do not have control over situations where they have sex and become pregnant, or on the notion that the baby's father will likely refuse to share in the childrearing, Amy might not benefit from the right after all.

Moreover, Amy's reasons for not wanting to be a mother go beyond her professional goals. Regardless of her situation at work, the lifestyle that Amy desires, including the ability to travel and relocate at will, is not conducive to parenthood. Thus, under an equal protection paradigm, Amy could be denied the right to an abortion, even though her autonomous decision would be that it is in her best interest to have an abortion.

Amanda, the nineteen-year-old college student, would also like to have an abortion. She cannot support a baby financially or emotionally. The father of her baby is her ex-boyfriend. They had a destructive relationship in which he sought to control her, and because they have broken up, she is finally living independently and exploring her options in life. Amanda has not told her ex-boyfriend that she is pregnant. She fears that he would try to force her to have the baby and to marry him. Amanda knows that is not what she wants. Furthermore, neither of them can afford to have the baby right now. Amanda believes that, if she has the baby, not only will she have to forget about her desires to travel, but she will also have to quit college in order to work part time to support herself and the baby.

Amanda represents the woman who most benefits from the equal protection argument for abortion. She has been dominated by her boyfriend and is only fully experiencing autonomy since she has been without him. Moreover, it is likely that she did not have control over getting pregnant, and that having a baby now would hinder her life goals, including her educational and professional pursuits. Moreover, most, if not all, of the financial support for the child would fall on her.

She cannot afford this and does not want to be dependent on her dominating boyfriend.

But Amanda is not the only type of woman that exists in our society; there are many Ashleys and Amys that need abortion rights for numerous reasons. The privacy and autonomy arguments would enable these three types of women to decide autonomously whether to procure an abortion, without justifying their fear of being unequal members of society as mothers.³²³

According to privacy and autonomy arguments, Amanda would still be entitled to an abortion because she is an autonomous human being capable of making important life decisions on her own.³²⁴ Likewise, Amy would be entitled to an abortion regardless of how much control she had over getting pregnant, and regardless of whether or not her reasons were limited to the pursuit of professional goals. Similarly, Ashley would not feel compelled to have an abortion in order to be able to pursue her professional aspirations. Although mothers currently face disadvantages in the workplace,³²⁵ ideally mothers should be treated equally to others in the workplace. If pregnant women who choose not to have an abortion are deemed to sacrifice professional equality for motherhood, as the equal protection argument implies, then mothers are precluded from being truly equal members of society.

Under the equal protection paradigm, motherhood becomes a disability—a disability that, once chosen, ensures ongoing inequality in the workplace. Feminists should not rely on a justification for abortion that classifies motherhood as a disability because it hinders goals for women who desire to be mothers and to pursue professional aspirations. Thus, if we accept the equal protection justification for abortion, we accept that mothers cannot be equal to others in the workplace. As the eradication of such inequality is a goal on which all feminists agree, continuing to champion the privacy and autonomy paradigm remains the best means for furthering these ends.

323. The privacy argument is not prone to the same vulnerabilities as the equal protection argument. For example, under the privacy argument, abortion could not be limited to women who did not have control over their pregnancy. Additionally, the privacy argument does not imply that the burdens of childrearing fall primarily on the mother, thereby suggesting that a woman must choose between bearing the child and pursuing her career goals.

324. Privacy critics, however, might assert (especially if Amanda were married to the father) that, by making abortion private, Amanda is not protected from consistent patterns of abuse. Thus, they contend that the equal protection argument is necessary because it gives women the power to make this decision, without denying that states have the authority to enter the private realm of the marital bedroom. The privacy argument for abortion, however, does not suggest that the domination of women in the marital bedroom is a private sphere. See *supra* notes 276-81 and accompanying text.

325. See *supra* notes 12-14, 130-32, 184-97 and accompanying text; *infra* text accompanying notes 336-38.

B. Mothers and Others: Achieving Gender Equality in the Workplace

Obviously, to ensure that women like Ashley are not made to feel compelled to have an abortion, a necessary step is to resolve the work/family conflict and to create true gender equality in the workplace. To equalize mothers and others in the workplace, feminists need to agree to disagree on the sameness/difference debate. This section first demonstrates that there is a middle ground in the sameness/difference debate. The section then proposes several measures that would satisfy both sameness and difference feminists, while furthering the goal of gender equality.

1. Finding a Middle Ground

Both sameness and difference feminists are united in that they seek to empower women and to create a world where men and women have equal opportunities to pursue their goals.³²⁶ Further, both sameness and difference feminists agree that there are legitimate biological differences between men and women, and that these differences can be used as a mechanism to put women at a social disadvantage.³²⁷ Where these dichotomous feminist arguments diverge, however, is in rectifying that problem.³²⁸

On the one hand, sameness feminists assert that the similar characteristics between men and women are more important than the differences between them.³²⁹ Thus, treating men and women differently exaggerates the differences and uses those differences to place women at a disadvantage.³³⁰ On the other hand, difference feminists assert that the differences between men and women are fundamental and that treating men and women in the same way is what exaggerates the differences, thereby placing women at a social disadvantage.³³¹ Thus, difference feminists argue that women should receive special protections under the law in order to minimize differences that place them at a disadvantage.³³²

The two groups of feminists, however, do not need to agree on whether the differences or similarities between men and women are more important in order to further gender equality in the workplace. Sameness feminists do not demand that special treatment laws be eradicated to promote gender equality. Their disagreement resides with gender-specific special treatment laws that promote stereotypical views of women. Therefore, to appease both camps of feminists,

326. See Williams, *Unbending Gender*, *supra* note 12, at 226.

327. See *supra* notes 109-12, 116, 177-78, 181-82 and accompanying text.

328. See *supra* notes 101-08, 114-117, 125-33, 175-83 and accompanying text.

329. See *supra* notes 116-24 and accompanying text.

330. See *supra* notes 125, 130-32 and accompanying text.

331. See *supra* notes 175-83 and accompanying text.

332. See *supra* notes 185-92 and accompanying text.

special treatment laws should be gender neutral by pertaining to parents instead of mothers.³³³

2. Proposals for Resolving the Work/Family Conflict and Promoting Gender Equality

National funding is a necessary element for the implementation of programs or policies that would resolve work/family conflicts. Public resources, though used to fight numerous other social problems, are largely absent in the work/family sphere.³³⁴ Public resources should be used to provide mechanisms that enable mothers and fathers to be ideal workers and ideal parents at the same time. For example, the government could either fund specific programs that support parents with their domestic responsibilities, or it could provide tax benefits for families that utilize private resources for similar purposes. Likewise, the government could create incentives for private employers to implement gender-neutral, family-friendly policies. National funding can accomplish two goals at one time: it can allow parents to be successful workers, and it can promote gender equality by changing the norm in the workplace from mother to parent. By encouraging mothers and fathers to participate equally in the home, equally in childrearing, and equally in the workplace, government funding can promote true gender equality.

As long as special treatment provisions exist only for women, or are only considered socially acceptable for women, society and the workplace will not be gender neutral.³³⁵ Women are consistently defined by their reproductive capacities.³³⁶ "Motherhood . . . is both made inseparable from the female worker *and* seen as being in conflict with her role in the marketplace. . . . The workplace has been

333. Additionally, if, as suggested by the plurality opinion in *Frontiero v. Richardson*, laws that distinguish between men and women were subject to strict scrutiny, then sameness feminists could be assured that the laws will not distinguish between the sexes unless there is a compelling need, and those laws are narrowly tailored to that need. See *supra* notes 138-49 and accompanying text. Likewise, difference feminists could be assured that special protections will not be taken away from women who need them, but that they will be applied in a neutral fashion. Furthermore, strict scrutiny would allow laws to distinguish between the sexes when there is a genuinely compelling need. The fact that there may be legitimate distinctions between men and women does not imply that laws that distinguish between this immutable characteristic should be subject to lower scrutiny. Rather, it means there may be more laws that survive strict scrutiny, compared, for example, to laws that distinguish between races, where there are fewer legitimate distinctions.

334. See Adrienne D. Davis & Joan C. Williams, *Gender, Work & Family Project Inaugural Feminist Legal Theory Lecture: Foreword*, 8 Am. U. J. Gender Soc. Pol'y & L. 1, 9 (2000); Selmi, *Family Leave*, *supra* note 11, at 710; Michael Selmi, *Care, Work, and the Road to Equality: A Commentary on Fineman and Williams*, 76 Chi.-Kent L. Rev. 1557, 1557 (2001) [hereinafter Selmi, *The Road to Equality*].

335. See Selmi, *Family Leave*, *supra* note 11, at 710-14; Selmi, *The Road to Equality*, *supra* note 334, at 1557-58.

336. Reilly, *supra* note 14, at 162.

defined as a place unsuited for mothers, and women have been defined as actual or potential mothers."³³⁷ Fatherhood, however, is not viewed as being in conflict with the workplace; nor has being actual or potential fathers disadvantaged men.³³⁸

If the concept of mother is the norm, and special treatment policies exist solely for women, then men will continue to have their wives sacrifice some, if not all, of their professional goals.³³⁹ Thus, before considering any specific provisions, the first change that needs to be addressed is replacing the concept of mother with that of parent. Essentially, this involves, as Joan Williams suggested, restructuring the workplace around family values,³⁴⁰ and not around "women."³⁴¹

Mothers typically have greater needs because fathers usually have wives who take care of domestic work, but mothers do not have husbands who take care of domestic work.³⁴² The answer, therefore, is not to provide extra time for women to do the work, but to provide extra time for men and women to do the work.³⁴³ Special treatment laws that only apply to women fail to solve the problem that women are left performing dual roles. It simply gives them more time to do so. Further, if men are left responsible for "bringing home the bacon" while women are given extra time at home, how can men be expected to begin participating more in housework and childrearing to even out the gender gap?³⁴⁴ In sum, gender-specific special treatment

337. *Id.*

338. *See id.*; Selmi, *Family Leave*, *supra* note 11, at 726.

339. *See* Joan C. Williams, *Restructuring Work and Family Entitlements Around Family Values*, 19 Harv. J. L. & Pub. Pol'y 753, 756 (1996) [hereinafter Williams, *Restructuring Work*]; *see also* Williams, *Unbending Gender*, *supra* note 12, at 4-5, 84; Joan Williams, *Toward a Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work*, 19 N. Ill. U. L. Rev. 89, 95 (1998) [hereinafter Williams, *Reconstructive Feminism*].

340. Of course, there is a danger that emphasizing family values might create different types of inequality. Thus, "family" should be defined broadly to include non-traditional family arrangements as well as traditional family arrangements. Peggie R. Smith, *Accommodating Routine Parental Obligations In An Era of Work-Family Conflict: Lessons From Religious Accommodations*, 2001 Wis. L. Rev. 1443, 1491 (suggesting that employers enact work/life policies, rather than work/family policies, to "appeal to a diverse range of employee constituencies").

341. *See* Williams, *Unbending Gender*, *supra* note 12, at 65; *supra* note 25 and accompanying text. Williams explains how the concept of the ideal worker is based on masculine norms. Williams, *Unbending Gender*, *supra* note 12, at 65. Her goal is to reconstruct the market to eliminate what she refers to as the "economic marginalization of women." *Id.*

342. *See* Williams, *Reconstructive Feminism*, *supra* note 339, at 95-96.

343. This does not mean that employers would be required to provide double the amount of time they may already provide. If men and women are participating equally at home, then women would not need as much additional time because they would not be responsible for the majority of the work. Instead, the amount of time that may currently be provided to women can be split between men and women.

344. *See* Joan Williams, *Do Women Need Special Treatment? Do Feminists Need Equality?*, 9 J. Contemp. Legal Issues 279, 288 (1998) ("[F]eminists need to recognize that many men cannot afford, economically or emotionally, to do more family work as

provisions "jeopardize infant development, impair fathers' formation of nurturing relationships, and force many mothers to choose between caretaking commitments and occupational advancement."³⁴⁵ For these reasons, sameness feminists are not content with gender-specific special treatment laws.

At the same time, if all that is changed is that special treatment is not provided at all, mothers are still burdened. They have the same responsibilities, but no time to accomplish them. Thus, the failure to recognize women's different situation—that they likely do not have a husband at home doing a majority of the housework and childrearing³⁴⁶—creates unequal results. If, however, special treatment provisions were provided to all parents, sameness feminists and difference feminists would both be satisfied.

Moreover, providing fathers with more time away from work has two beneficial results. First, it allows men to contribute more equally in the home, and allows women to compete more equally in the workplace. As time progresses, the roles between men and women in the home and the workplace will even out and the norm will become equal participation. Second, special treatment for men will allow fathers to be more involved in their children's lives.³⁴⁷ As fathers and mothers become more equally and fully involved in their children's lives, the concept of family will become more central to society and will replace the view that mothers are supposed to be the primary caretaker.

Sameness feminists may still be troubled by one aspect of gender-neutral special treatment provisions: even when these opportunities apply to men and women, men rarely take advantage of them.³⁴⁸ This is largely because of the traditional view that childrearing and domestic chores are the responsibility of women, and because men who utilize special treatment options may face discrimination for violating prevailing gender norms.³⁴⁹ Thus, there is a circularity problem. By providing special treatment laws to women only, the

long as they have to pay for caregiving in the coin of marginalization. Most families rely on men's wages, so most men cannot afford to marginalization [sic] at work.").

345. Rhode, *Justice and Gender*, *supra* note 13, at 123.

346. See Williams, *Reconstructive Feminism*, *supra* note 339, at 95-96.

347. See *id.* at 93-94. Men in senior positions at their companies often look back to their fathering years and regret their lack of involvement with their children. *Id.* at 119. Moreover, performing according to the ideal worker standard set by male norms can seriously impact one's health. *Id.* at 119-20. The goal, therefore, is not to enable women to perform under the same ideal worker standard, but instead to establish a new ideal worker norm that incorporates the concept of family. See *supra* note 24 and accompanying text.

348. Rhode, *Speaking of Sex*, *supra* note 16, at 151-52 (noting that only between one and seven percent of men who have parental leave available to them take advantage of such an opportunity); Selmi, *Family Leave*, *supra* note 11, at 755-56.

349. Rhode, *Speaking of Sex*, *supra* note 16, at 152; Selmi, *Family Leave*, *supra* note 11, at 758-59.

view that childrearing and domestic chores are the woman's responsibility is perpetuated. But, because that has been the view for so long, even when men are provided with the special treatment provisions they do not take advantage of them.

In Sweden, to combat a similar problem, the government required men to take parental leave.³⁵⁰ Michael Selmi has considered whether requiring paternity leaves would resolve this dilemma in our society.³⁵¹ As Selmi noted, however, requiring paternity leaves, or any form of parental leaves, might conflict with our Constitution.³⁵² Selmi therefore proposed that government reward employers whose male employees take advantage of parental leave provisions.³⁵³ This would create an incentive for employers to encourage male employees to take advantage of parental leave policies rather than criticize those who utilize such provisions.

As Selmi explained, however, rewarding only those employers whose male employees take advantage of special treatment provisions may create other dilemmas.³⁵⁴ Such a system may cause employers to prefer male employees over equally qualified female employees. Employers may then expect both men and women to take advantage of such laws, but they will at least be compensated when male employees utilize their options. Additionally, employers might not encourage women to take advantage of such options and might still place those women who do on a "mommy track."

Therefore, if the government created incentives for employers to encourage all of their employees to take advantage of parental provisions, male and female employees, as well as employers would all benefit.³⁵⁵ Men and women could freely utilize such provisions, while employers receive governmental compensation. Such a policy would create both short-term and long-term benefits.

Selmi's suggestions were limited to the context of childbearing, and therefore, the special provisions he discussed were limited to parental leave following the birth or adoption of a child.³⁵⁶ The work/family conflict, however, is not limited to childbearing. The remainder of

350. Williams, *Unbending Gender*, *supra* note 12, at 236.

351. Selmi, *Family Leave*, *supra* note 11, at 773-74.

352. *Id.* at 774.

353. *Id.* at 775.

354. *Id.* ("[A]ny such program could be structured in a gender-neutral fashion so as to avoid some, but not all, legal challenges."). Selmi focused on the legal implications that such policies might create. *See id.* He did not consider the social implications of only rewarding employers with a strong record of men who take paternal leaves.

355. For example, the government could provide certain tax benefits for employers with a strong record of male and female employees utilizing parental leave policies. *Cf.* Smith, *supra* note 340, at 1486 (suggesting "a system of employer tax credits" to mitigate any "gender segregationist implications" that may be associated with family-friendly policies).

356. *See* Selmi, *Family Leave*, *supra* note 11, at 713.

this section proposes suggestions that would mediate the work/family conflict as it relates to childrearing.

One proposal to resolve the work/family conflict in the context of childrearing is to encourage companies to provide a limited number of "family days" to their employees every year. Family days would be defined as days where an employee does not have to go in to his or her office, but may tend to family needs and work from home.³⁵⁷ This would enable fathers and mothers to attend school conferences, their child's play, or take their child to the doctor when he or she is sick.³⁵⁸ Creating a work environment that is conducive to the needs of parents takes the burden off women who feel that they have to "step up to the plate" at home and jeopardize their careers when employers do not offer such opportunities. It also allows fathers to be more involved in their children's lives without being devalued as employees. To encourage companies to provide family days, the government can provide tax benefits similar to those for the parental leave policies described above.³⁵⁹

Additionally, although there has been some tax-subsidized childcare assistance,³⁶⁰ a "[n]ational policy toward childcare has been notable largely for its absence. What little governmental support has been available for childcare has been for highly circumscribed time periods, such as World War II, or for limited populations, such as poor immigrants and wartime factory workers."³⁶¹ Moreover, "employers [have not] been willing to fill the gap."³⁶² Thus, widespread government-subsidized childcare for families may be necessary so that parents can work and still provide quality childcare for their children.

Further, improvements in childcare are necessary for parents to be willing to put their children in childcare programs. Childcare providers lack sufficient training and are among the nation's most poorly paid employees.³⁶³ Concerned parents are therefore likely to

357. Technology advancements make working from home very reasonable to accommodate. See Estrich, *supra* note 6, at 109-10.

358. Several states have already enacted family leave statutes that further this purpose. See, e.g., Smith, *supra* note 340, at 1455 (discussing Louisiana and Massachusetts family leave statutes, which provide employees with additional hours of leave to tend to childrearing needs). A large number of family days do not need to be provided to make this an effective policy. The point of the policy would be to have these days available when parents truly need them, without being ashamed to ask for them. Except in the case of emergencies, these days could be planned in advance so that the employer can make accommodations for the employee's absence. In addition, employees can prepare by bringing home any materials that they would need to complete their work.

359. See *supra* note 355 and accompanying text.

360. Rhode, *Speaking of Sex*, *supra* note 16, at 154.

361. Rhode, *Justice and Gender*, *supra* note 13, at 129-30.

362. *Id.* at 130.

363. *Id.* Low pay for childcare may be a form of gender discrimination itself because most childcare providers are women. See, e.g., MacKinnon, *supra* note 110, at 1312.

sacrifice professional goals so that they can provide proper care for their children themselves. Increasing the quality of childcare programs, and providing economic benefits for parents who use childcare, will encourage parents to take advantage of childcare programs and to feel confident that their children are in good hands.

Another mechanism to resolve the work/family conflict may be to allow families in which both parents work (as well as single-parent families) to use pre-tax dollars for cleaning services. This would assist women who are typically responsible for a large portion of domestic chores. Additionally, it enables all parents to spend their time away from work with their children, as opposed to fulfilling other domestic responsibilities.

A final proposal to assist in restructuring the workplace around family instead of "mother" or "woman" is to implement a system of employer report cards. Employees could rate their employers on how conducive the workplace is to family needs. Employers who receive high ratings by both male and female employees can receive additional governmental benefits.

One last point to consider is how restructuring the marketplace around the concept of family will affect employers. From an employer's perspective, a valuable employee is one who is available whenever needed, puts in long hours to generate large profits, and produces high-quality work-products.³⁶⁴ Therefore, if an employer is faced with two potential employees and both are equally qualified, but one is a parent and the other is not, the employer may still believe the non-parent candidate has more potential value in the long run. Tax benefits may not be sufficient to outweigh the benefit of constant availability that a non-parent employee may be able to provide. Employers may also fear that, without a long-term commitment to a company, the time and money spent training young workers while they are raising their children may not pay off in the end.³⁶⁵ Therefore, providing tax benefits to employees who remain with a company for the long run may give employers more assurance that their investment in employees with children will pay off in the end. A company with a good record of being family-friendly³⁶⁶ can request

364. See *supra* note 24.

365. See, e.g., Estrich, *supra* note 6, at 112 (noting that employers fear the short-term costs of generous leave policies and greater flexibility for parents). But see Smith, *supra* note 340, at 1482-83 (stating that family-friendly workplace policies benefit both employers and employees by increasing "productivity and worker stability"). "[W]orkers who feel personally supported by their employers are more likely to think innovatively on the job, make important contributions at work, and feel more attached and loyal to the organization." *Id.* at 1482 (quoting Marion Crain, *Where Have All the Cowboys Gone? Marriage and Breadwinning in Postindustrial Society*, 60 Ohio St. L.J. 1877, 1954-55 (1999)).

366. A family-friendly company could be, for example, a company that consistently scores high on employer report cards described above.

that its employees of twenty or more years receive certain tax benefits. If employers are confident that the time and effort they spend training young employees with children will generate long-term profits, then the marketplace can be restructured around family norms without detriment to employers.

CONCLUSION

Although gender equality both in and out of the workplace is predominantly a social issue, there are legal remedies that can help further equality. The law can either enable one to cope with the situation without resolving the underlying dilemma, or push towards equal treatment and equal results.

Abortion rights have given women more control and autonomy over their lives. Although abortion rights may have been a factor in enabling women to progress in education and the workplace, grounding the right to abortion on an equal protection theory does not further true gender equality. Rather, grounding abortion rights on an equal protection theory ratifies the view that mothers cannot participate fully and equally in society.

In order to achieve true gender equality, mothers must be considered equal to others in society and in the workplace. The answer is not merely giving women more time to accomplish numerous jobs; it is making it more acceptable for men to share in domestic tasks and childrearing, and enabling mothers to participate equally in the workplace. Government funding and tax incentives can be a helpful tool in replacing the concept of mother with that of parent so that true gender equality can exist.

Can we really have it all?³⁶⁷ Can men and women be equals at home and in the workplace? Can employers encourage their employees to be ideal parents and still be confident that they will also be ideal workers? One thing is for certain: it is a goal well worth striving for. And though this goal may seem to be a far-fetched dream, Abigail Adams's remonstrance to "remember the ladies,"³⁶⁸ and Myra Bradwell's legal battle for the right to practice law,³⁶⁹ also seemed like far-fetched dreams to their contemporaries. Nothing is impossible; so let us not turn our backs on true gender equality just yet.

367. See Linda S. Eads, *Betty Crocker or Barbara Jordan: Limited Roles for Women and the Effect of Reproductive Technology on Motherhood*, 7 Tex. J. Women & L. 185, 186-88 (1998) (stating that women have always had a desire to fulfill multiple roles, including that of wife, mother, and worker).

368. See *supra* text accompanying notes 27-29.

369. See *supra* note 37 and accompanying text.

Notes & Observations